FBI STATUTORY CHARTER

FBI STATUTORY CHARTER—Part 1

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-FIFTH CONGRESS

SECOND SESSION

ON

FBI STATUTORY CHARTER

PART 1

APRIL 20 and 25, 1978

Printed for the use of the Committee on the Judiciary

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FBI STATUTORY CHARTER

THURSDAY, APRIL 20, 1978

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 9:30 a.m., in room 2228, Dirksen Senate Office Building, Senator Edward M. Kennedy (acting chairman of the committee) presiding.

Staff present: Robert M. McNamara, Jr., counsel.

OPENING STATEMENT OF SENATOR KENNEDY

Senator KENNEDY. The committee will come to order.

This morning the Senate Judiciary Committee opens hearings to lay the foundation for development of a statutory charter for the Federal Bureau of Investigation. Such a charter must clearly define the scope of the Bureau's responsibilities and the extent of its authority. This task is a challenging one for all involved: the Congress, the Bureau, and the interested public. But it is one whose difficulty cannot be underestimated and whose importance cannot be denied.

For the past half century, the Federal Bureau of Investigation has been not only the primary, but also the premier, Federal law enforcement agency in this country. Its history is replete with individual heroism, signal accomplishments, and investigatory excellence, to the point where these qualities have become the accepted benchmark for judging any work undertaken by the Bureau.

The FBI has not achieved this stature and gained the confidence and respect of the American people through historic accident. It has earned its well-deserved place in both history and present society because thousands of talented, dedicated, and exceptional men and women have for over five decades, devoted their lives to making this country safe and free for the rest of us.

But while we cannot and should not lose sight of the stature, reputation, and respect that has been hard-earned and remains well-deserved by the FBI, we also cannot ignore or excuse the too-large numbers of instances where the awesome power of the Bureau has been seriously abused. Each week brings new revelations of how agents of the FBI not only may have abused their authority, but also may have broken the very law they were sworn to defend and enforce. Just last week, indictments were handed down against three of the highest ranking former Bureau officials for having allegedly engaged in illegal activities.

I do not think that we can gage the devastating effect those indictments may have had on the confidence and respect which the American people have had for the Bureau. But while the indictments stand as a clear and unequivocal statement that no one is above the law, they might never have been needed had there been a clear statutory charter which defined the parameters of legal authority and proper procedures for the Bureau.

Congress and the executive branch must share responsibility with the Bureau for the fact that the FBI has never before been truly accountable to anyone for anything. The Bureau, for decades, operated with independence from any day-to-day accountability within the Justice Department or the executive branch.

Congress only recently has exercised its own responsibility to question the overall directions, the underlying policies, and the basic program decisions of the Bureau.

This committee has only this year begun to evaluate and analyze the budget for the entire Department of Justice. This is the first time that we have attempted to ensure that the Department's priorities and focus were in line with those of the Congress. A collateral—and beneficial—effect of this process has been our increased appreciation of the tremendous responsibilities the Department has, and of the complexity and difficulty of its efforts to discharge them.

Last week, this committee held hearings on the portion of the budget which related to the Federal Bureau of Investigation. In those hearings, I sensed a subtle but nonetheless perceptible new attitude within the Bureau: An attitude of candor about itself and its own shortcomings; an attitude of heightened concern for the rights of Americans; and an attitude of determination to rebuild itself and learn from past mistakes. I hope this vision is not clouded or distorted by my own expectations and hopes.

The Bureau has begun a new era. Judge Webster is its first 10-year director, and he has brought to that post an essential sense of integrity and justice. The Bureau has begun to define gradually its new priorities and to focus its emphasis on complex areas of national concern. The highly skilled and dedicated men and women of the Bureau are determined to restore it to its rightful position of national respect and confidence.

The responsibility for the success of this endeavor must be a shared one. A statutory charter for the Bureau is an indispensible component of the calculus for success. The Bureau, its agents, and the American people have a right to demand that there be a clear mandate from Congress defining what the Bureau is to do in the future and how it is to accomplish its objectives.

The multifaceted responsibility which the Bureau has, and the diverse tasks which it performs, must be clearly spelled out. Rather than relying on a gradual evolution of authority—which ordinarily occurs on the basis of practical convenience, political whim, or personal bias—the FBI should justify its activity on the basis of legislative and executive priorities and within strict statutory limitations. Agents in the field and personnel at headquarters have a right to know what they can do and how they should do it.

Never again should fear of the known or unknown justify illegal activities; never again should the Constitution give way to expedi-

ency; never again should fundamental rights be sacrificed for instant results; never again should the people of this country wonder whether those who are enforcing the law are also obeying it; and never again should the pride of an agent be replaced by a shared feeling of shame.

The principled leadership which Attorney General Bell has brought to the Justice Department and Director Webster has brought to the Bureau give us cause for optimism. Both men have called for a charter, and both men have committed themselves and their resources to the task.

This effort to develop a charter is not an attempt to hamstring or harass or investigate the Bureau. We are not here to right the wrongs of the past decade; we are here to ensure that the darker moments of the Bureau's past will not come back to repeat themselves or haunt us in the future.

The work which we are beginning was discussed by James Madison when he wrote:

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed, and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity for auxiliary precautions.

It is these "auxiliary precautions" which we must formulate and codify.

The fundamental and cherished values which over 200 years ago we fought to ensure are fragile and must be protected. The basic constitutional rights and civil liberties which we hold so dear are our greatest national resources. Any erosion, however gradual, is tragic and often irreversible.

Mr. Attorney General, we welcome you and Director Webster and your associates here this morning. We look forward to your testimony.

STATEMENT OF HON. GRIFFIN B. BELL, ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, ACCOMPANIED BY MARY LAWTON, DEPUTY ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL

Attorney General BELL. Thank you, Mr. Chairman, and members of the subcommittee. I am pleased to meet with you today to discuss, in general terms, the outline of a charter for the Federal Bureau of Investigation.

I think it is important that we begin with exploratory discussions, such as you have outlined for this hearing, before attempting to draft specific legislative proposals. Since I first appeared before this subcommittee during my confirmation hearings, I have been committed to the idea of a legislative charter for the FBI. I must admit candidly that at that time I did not appreciate the complexity of the issues which must be resolved before such a charter can be drafted.

As you know, we began almost immediately working with this subcommittee, the Select Committee on Intelligence, as well as with the House of Representatives on legislation to provide judicial warrants for electronic surveillance in the field of foreign intelligence and counterintelligence. We have reason to hope the Foreign Intel-

ligence Surveillance Act will become law this year. In addition, we have begun discussions with the Intelligence Committee on the preparation of charters for the intelligence community, including the intelligence components of the FBI.

Much work remains to be done on those charters, but it is important that we move ahead at the same time developing charters for the nonintelligence functions of the FBI. It is these functions I want to discuss with you today. Despite its long history, the Bureau has received very little statutory guidance. There, are, basically, only three provisions defining its duties: 28 U.S.C. 533, 28 U.S.C. 534, and 42 U.S.C. 3744. In only the most general terms, these provisions authorize the FBI to detect and prosecute offenses against the United States, assist in the protection of the person of the President, investigate matters under the control of the Department of Justice and the Department of State, collect crime records and exchange them with Federal, State, and local agencies, and provide training for State and local law enforcement.

These limited provisions provide little assistance in understanding the role that the FBI performs today. Accordingly, it may be helpful if I review the work presently done by the Bureau, outside the intelligence area. The FBI is, of course, our premier law enforcement agency. It has responsibility for investigating most of the offenses defined in our Federal criminal code, but, as you are well aware, some specific offenses are the responsibility of other Federal agencies.

In some cases, the dividing line between Federal investigative agencies is clear, the Secret Service investigates counterfeiting and the FBI does not. In other instances, jurisdiction is less precise, the Bureau of Alcohol, Tobacco and Firearms investigates most bombing matters, but those relating to terrorism are within the jurisdiction of the FBI. FBI jurisdiction also overlaps that of the States. In many instances conduct prohibited by Federal law is also proscribed by the States. In addition, flight to avoid prosecution under State law is a Federal offense and the FBI investigates to locate fugitives who have fled across State lines. In the past, the investigative efforts of the FBI were directed primarily at identifying and apprehending those who commited specific violations of Federal law. Increasingly, in modern times, the FBI has been asked to determine the existence of Federal law violations in the first instance, as well as identifying those responsible for criminal acts.

Complex organized crime, political corruption and fraud cases often require extensive investigation to determine whether, in fact, a Federal law has been violated and who is ultimately rseponsible for directing the criminal enterprise.

Since it is less clear at the outset what the dimension of the criminal conduct may be, the investigation may range more widely in scope than in, for example, a clear-cut bank robbery case. This presents unique problems for the FBI, since it will involve collecting information on a larger number of citizens, and initiating an investigation without necessarily having probable cause to believe a specific crime has been committed. Similar problems arise in connection with the investigation of terrorist groups which may be involved in a pattern of conduct, some of which is legal, some of which violates State law, and some of which violates Federal law.

Determining when activities of these groups fall within Federal jurisdiction and identifying who is ultimately responsible for directing the terrorist acts, without exceeding FBI jurisdiction or branching too far afield, and investigating legitimate protest groups who speak of violence in the abstract but do not engage in it, is a problem with which both the FBI and the Department have been grappling for the past 4 years. Difficult as the problems of criminal investigative jurisdiction may be, they are at least grounded in the criminal code, a code which this committee has made great strides in clarifying. The other functions which the FBI performs have even less specific guidance.

At the request and direction of the Department of Justice, the FBI undertakes a variety of civil investigations both of an enforcement nature, and for the purpose of defending suits against the Government. Civil rights statutes, economic regulatory provisions, civil fraud, antitrust and general civil enforcement provisions fall within the jurisdiction of the Department of Justice. Some of these laws are both criminal and civil in nature; others are purely civil. Many of them require complex factual showings in order to bring enforcement proceedings.

When necessary, the Department calls upon the FBI to collect the facts needed to bring action to enforce these laws. On occasion, the Department also asks the FBI to provide facts required for the defense of suits against the United States. While we believe these functions fall within the broad mandate of 28 U.S.C. 533(3), it would be helpful to have this responsibility of the FBI clarified.

Senator KENNEDY. Would these functions be better carried out by the investigators hired by the Civil Division?

Attorney General BELL. I do not know. The FBI agents are such good investigators I would like them to be able to do this. I find that everybody you get on a job like this in one of the litigating divisions wants to be a lawyer. They want to try cases, so you can hardly keep them in place. The investigator is a profession of its own. I would like to keep this in the Bureau, but I think it needs to be said they can do it.

Senator KENNEDY. Excuse me, Mr. Attorney General. On the top of your previous page, you point out:

> Since it is less clear at the outset what the dimension of the criminal conduct may be, the investigation may range more widely in scope than in, for example. . . .

Are there investigative standards now being used which protect the privacy of citizens?

Attorney General BELL. Yes.

We have guidelines, but we also have a general approach on these domestic security investigations. I might say that in recent days there has been a lot of confusion amongst the American people between foreign intelligence investigations and domestic security investigations. We have fallen into the habit of saying "national security," and that would indicate that we are running them together.

On domestic security where you involve American citizens, we have a strict approach that Attorney General Levi started. We have been following that. There has to be a nexus to crime or otherwise we do not do it. That is why we have cut down sharply on the num-

ber of these kinds of investigations that we have had going on. In addition to that, we have guidelines.

Senator KENNEDY. That is what I wanted to ask you. You say later in the paragraph:

> This presents unique problems for the FBI, since it will involve collecting information on a larger number of citizens and initiating an investigation without necessarily having probable cause to believe a specific crime has been committed.

What is "the investigative standard?"

Attorney General BELL. The investigative standard?

Senator KENNEDY. Yes.

Attorney General BELL. In addition to the guidelines which are too detailed to recite, there has to be an investigation of the crime. It is under the section of the Code, sec. 533, which says that the duty of the Attorney General is to investigate and prosecute crime. That is the FBI's same authority; that is the authority I have. The difference is, and the point I was trying to make at that point is this: It is one thing to say somebody has committed a crime and to find out who did it. It is another to say: "Has a crime been committed?" That is where we are having the added responsibility.

In the old days if a crime was committed, life was simplier, and we would find the person who committed it. Now we are trying to find, by not only surveillance, but in many other ways, whether a crime has been committed. The Bureau is told to find out whether these people or this person has committed a crime. That means that you are keeping up with more people just as my statement says there.

Senator KENNEDY. Does that apply in domestic security cases?

Attorney General BELL. Yes; I think in the next paragraph I deal with that. I am talking about Federal jurisdiction.

What do these people do? Are they violating laws? If so, are they Federal violations? Or, are they State violations? This is a difficult area. You would be interested in the process, I think. Last year we were going to review every domestic security investigation we had going on as the allowed time expired.

Jim Adams and some of his other people came over one day in Justice Department's conference room. We sat down. I had some of my people there. We said: "Let us run through two or three of these investigations. Let us see if we ought to continue them or cancel them. Is there a nexus to criminal investigation?"

Well, we ran through two or three that day, and we all got a feel for it. I do not think I have been through another one, the FBI, as they have come up, assessed them themselves. They have discontinued some of those that they had not discontinued under Attorney General Levi. So, I think we are focusing right now on the jurisdictional question, that it: "Is it investigating crime?"

Senator KENNEDY. All right. Please continue.

Attorney General BELL. The resources of the FBI are also called upon increasingly to provide background investigations for persons under consideration for a variety of Government offices.

In a few cases this is expressly authorized by statute or by Executive order, but for the most part these investigations are conducted as a matter of tradition or custom. That is something we need to discuss—

should we cut back on that? For example, there is no statute or Executive order directing the FBI to conduct background investigations for Presidential appointees, but, as you know, this is done routinely. Nor is there any statutory authority for the FBI to conduct investigations on behalf of congressional committees in connection with appointments to their staffs. In this Congress, however, the FBI is conducting such investigations at the request of 12 separate committees. It is time that we consider whether this is a proper role for the FBI and, if it is, we should expressly confer this responsibility by statute.

To a limited extent the role that the FBI performs in furnishing both information and training to State and local law enforcement is conferred by statute: 28 U.S.C. 534, and 42 U.S.C. 3744. The statutes, however, do not specify the manner in which crime information may be exchanged with the States or whether the exchange of information may cover such other matters as missing person information.

I would say that one of the most interesting concepts that I have faced since I have been in Washington is what has been, or what is now known as message switching. About every 3 months, there is a great story in the paper that we have been caught trying to message switch.

I have never understood message switching, but I have made it clear to the Congress and to the FBI that we will never engage in that unless I sign, and I never have. Someday I am going to find out what it means and all the ramifications of it. It is a glamorous thing when you see it in the headlines: "FBI Seeks Money for Message Switching."

As I understand it, it is giving information to Scotland Yard or to the Canadian Mounties. They sometimes want to get information from the FBI. It may also be giving it to State police. But we would need to get into that because it sounds as though we are doing something wrong when we have not done anything wrong.

Senator KENNEDY. Let me ask this: Before that, on the same page, you indicate the FBI supplies 12 separate committees of Congress with background investigation reports on congressional staff personnel. Would you provide us a list of the committees involved?

Attorney General BELL. Yes; we will submit those.

Senator KENNEDY. Without objection, so ordered.

[The list of congressional committees requesting FBI background investigations of congressional staff employees referred to above follows:]

The following Senate Committees requested 341 background investigations during the 94th Congress and 158 background investigations during the 95th Congress (up to March 6, 1978) for a total of 499 background investigations: Senate Committee on Armed Services; Senate Committee on Foreign Relations; Senate Committee on the Judiciary; Senate Select Committee on Intelligence, and Senate Select Committee on Ethics.

The following House Committees (and subcommittees) requested 58 background investigations during the 94th Congress and 225 background investigations during the 95th Congress (up to March 6, 1978) for a total of 283 background investigations: House Committee on Appropriations; House Select Committee on Assassinations; House Select Committee on Narcotics Abuse and Control; House Committee on Judiciary; House Committee on Standards of Official Conduct; House Permanent Select Committee on Intelligence (House Select Committee on Intelligence Activities), and House Subcommittee on International Organizations.

Senator KENNEDY. Can someone get a top secret clearance if another agency does the check?

Mr. ADAMS. Yes; the military do some of the investigations. The State Department conducts certain investigations, and the Civil Service Commission conducts some.

Senator KENNEDY. Do they have top security clearance?

Mr. ADAMS. Yes; the standards basically require a full field investigation and then based upon the results of that, the agency itself

Senator KENNEDY. Do they have top security clearance?

Attorney General BELL. The CIA does their own clearance and investigations.

Mr. ADAMS. Yes.

Senator KENNEDY. Thank you.

Attorney General BELL. As I will discuss later, the provision of crime information to State authorities by the FBI has been criticized, and it is time that we reexamine whether we want the FBI to continue to perform these services and, if so, under what conditions. It is unfair to give the FBI a broad general mandate in terms so vague as to permit a variety of interpretations and then to criticize it for its interpretation. I have briefly reviewed the varied functions that the FBI performs today because I believe that the underlying issue in any charter is whether the FBI should continue to perform some or all of its functions that it now undertakes.

A charter is, by definition, a statement of functions, powers and duties. Before such a statement can be drafted in legislative form, we must decide precisely what the basic functions, powers, and duties of the FBI should be. In the area of criminal investigations, there are several basic decisions which must be made. Should the FBI be responsible for all Federal criminal law enforcement or should it continue to share the responsibility with other Federal agencies such as the Drug Enforcement Administration and Secret Service. I might also add the Alcohol, Tobacco and Firearms agency which has about 4,000 people.

These are questions now under study by the President's Reorganization Project Law Enforcement Study Team. They present difficult policy issues. Centralization of functions promises greater efficiency and coordination but it also inevitably leads to a concentration of power which our constitutional scheme has sought to avoid. Decentralization, on the other hand, inevitably results in overlapping jurisdiction, sometimes destructive competition, and lack of coordination. We must carefully weigh these concerns in deciding whether to expand FBI criminal investigative jurisdiction or leave it essentially in its present form.

We face equally difficult choices in determining whether the FBI should confine itself to the classic detective role—apprehending the individual responsible for committing a specific criminal act—or should also be responsible for detecting the existence of criminal activity and preventing its continuance or reoccurrence. Because of abuses which occurred in the past in connection with so-called domestic security cases, some have suggested that the Bureau should never play a role in detecting the existence of crime or in preventing crime. I disagree. Surely the investigative forces of the Federal Government should not be monitoring the legitimate first amendment activities of our citizens because the views they are expressing are controversial or even antithetical to our constitutional system.

But just as surely, the FBI should not stand idly by while terrorist groups seize hostages or set off bombs merely because the terrorists purport to act in the interests of a "cause." If we have information that a group is preparing to commit a violation of law or is engaged in a continuing pattern of Federal law violation, I believe it is incumbent upon us to protect our citizens by preventing violations if we can.

Similarly, the FBI should continue to work with our organized crime strike forces in determining where criminal enterprises are engaged in or planning violations of Federal law rather than concentrating exclusively on each specific violation as an isolated act. In my judgment, the mandate to "detect and prosecute" violations of Federal law extends to determining when such violations are occurring as well as identifying the individual criminals.

Because these questions have been raised, however, it becomes important that a charter spell out clearly whether the FBI is to be responsible for detecting and preventing crime as well as detecting and prosecuting criminals. We must also decide whether the Bureau should be a criminal investigative agency exclusively, or whether it should continue to investigate civil matters for the Department of Justice. I am inclined to believe that civil enforcement is as important as criminal, and that the Department of Justice should be able to call upon the FBI to develop cases for civil fraud or civil rights enforcement as well as for prosecution. If this work is to continue, however, Congress should make clear that it expects the Bureau to perform these duties.

More difficult issues are posed in connection with the background investigation of Federal officers and employees. As you are aware, the Executive orders covering this matter are out of date, and the statutes seem to have been passed on a hit-or-miss basis. Moreover, many of the investigations now conducted by the Bureau are based entirely on custom and have no clear statutory authorization. If this work is to continue, the FBI should be given a clear mandate, and should not be asked to exceed that mandate as a matter of comity to other agencies, the Congress, or the judicial branch.

While Congress has directed the FBI to engage in various support services to State and local law enforcement, it has also criticized the FBI for the manner in which it does so. One example is the National Crime Information Center, particularly the computerized criminal history portion of that system. Attorneys General have, in the past, been asked to delay approval of the decentralization of this system until Congress has had an opportunity to address the issues, but no legislation has been forthcoming. We have now begun discussions with interested congressional representatives on the issue. As with all of the charter issues, we will work closely with Congress to ensure clear policy direction to the FBI and the States which use the system.

The primary role of a charter is to define the functions, powers, and duties of an organization. A new charter for the FBI should also contain limitations and restrictions on the exercise of those duties to insure that the mistakes of the past will not be repeated.

Senator KENNEDY. What types of limitations or restrictions are you referring to here?

Attorney General BELL. The main one I have seen, which I would favor, would do away with some of the background investigation

work that we now engage in. I really have not thought of anything else I would want the FBI not to do. I am concerned that the charter is beyond this, and the charter is hard to write, but I am thinking more of a system where we have all the Federal investigations on the domestic side under one head. We have the A.T. & F. over at the Treasury Department and the DEA in the Justice Department. I look at the wiretaps every month, that is, the wiretaps under title 3. You ought to look at that sometime. You would be surprised at the agencies that do wiretaps, and that have these investigative powers and engage in this sort of thing. This is under court order.

Senator KENNEDY. Will you make some recommendations on the need for domestic wiretaps based on our concern for privacy of the individual?

Attorney General BELL. What I would like to do is to get all of these agencies, to the extent possible, under one head. After that, we can start finding out whether we are doing a good job or whether we need to amend title 3, the wiretap law. But I am not planning on doing that right now.

The President's reorganization of law enforcement would go some in this direction. But, of course, you know they have this border study, which is something else again. This would have customs and the border patrol considered there. But I think the answer to your question specifically is that I do not know of anything that I do not want the FBI to do. However, I would want them to cut down on the background investigation work. As I see it, what we need in the FBI is to have their duties spelled out in statute. The little statutory power that we have right now is rather vague, although we do operate under it. It is important, however, that the drafting of restrictions to meet particular problems not evolve into the statutory enactment of an operating manual.

As this committee is aware, the Department of Justice has promulgated various guidelines and policy statements governing the conduct of particular types of investigations and the use of certain sensitive investigative techniques.

In addition, the FBI has its own comprehensive manual setting policy for investigative activities. These are very detailed in some respects and require case-by-case determinations to be made on the conduct of particular investigations. I do not dispute the desirability of exerting this type of control over FBI activities. I suggest, however, that it is a degree of control more appropriate to internal directives than to permanent legislation.

It is my view that legislation should establish the fundamental limitations which are to be applied, provide adequate legislative oversight, and fix executive responsibility. It should not attempt to dictate the day-to-day functioning of an executive agency with diverse responsibilities.

Senator KENNEDY. You point out in your own testimony, "the exercise of those duties to insure that the mistakes of the past will not be repeated." How do you hope to prevent a recurrance of those abuses in your charter?

Attorney General BELL. What I have said to the agents when I have spoken to them over the 15 months I have been Attorney General—and I have spoken to a lot of agents in a lot of different towns—is: "If

it is not in the manual, do not do it." If it is not in the charter I tell them not to do it. It cannot be in the manual if it is not in the charter. You have to tie that to the charter.

Everything that could be said to be a violation of the law is something that can be avoided if it is in foreign intelligence, and that I sign, and that Director Webster signs. If it is in a crime area, which would include domestic security, then you get court orders. That is about as simple as you can put it. I realize it is difficult on an agent out in the field when he is told to do something to run back up the line to see if everything is in writing. But that is just the way it has to be. We have systems. Insofar as I know, we are following the systems very well indeed. The things that I have seen in the past that went wrong were things where the system was not followed.

Senator KENNEDY. You mentioned "* * * the Department of Justice has promulgated various guidelines and policy statements governing the conduct of particular types of investigations and the use of certain sensitive investigative techniques."

Can you make those guidelines and policy statements available to us?

Attorney General BELL. Oh, yes.

Senator KENNEDY. Thank you.

Without objection, that material will be entered into the record at this point.

[The following responses were received by the subcommittee to Senator Kennedy's request for additional information:]

Question. What Departmental or FBI guideline procedures or policies are available that govern conduct of criminal investigations?

Answer. FBI investigative jurisdiction in criminal cases is based on specific violations of Federal laws. Investigations are conducted when information is received indicating a violation of Federal law, over which the FBI has been given investigative jurisdiction, has or may have occurred. The function of a Special Agent of the FBI is to conduct thorough investigations of cases in a legal and ethical manner and to carry each of these cases through to a logical conclusion. Criminal investigations conducted by the FBI are not "fishing expeditions" since each investigation must have as its basis an allegation that violation of a Federal law under FBI investigative jurisdiction has occurred. FBI Special Agents may not engage in entrapment or conduct considered illegal in connection with carrying out these investigations. We are mindful of the constitutional rights of all parties involved in one of our criminal investigations. Special Agents of the FBI must identify themselves by name, title, and a display of credentials in connection with interviews conducted. All employees of the FBI are guided by the provisions of Departmental Order 350-65 dated December 28, 1965, which sets forth regulations concerning the conduct and activities of our employees. All FBI employees are expected to obey not only the letter of the law, but the spirit of the law as well, whether they be engaged in activities of a personal or official matter.

Question. What Departmental or FBI guideline procedures or policies are available that govern the conduct of criminal, civil, applicant, or civil rights investigations?

Answer. This response pertains to civil investigations only.

Investigations in civil matters are instituted at the request of the Department of Justice or the U.S. Attorney on a case by case basis which contain instructions ranging from limited and specific to broad and general, depending on the Department's or U.S. Attorney's desire. FBI investigation is conducted in accordance with these instructions.

The FBI's Manual of Investigative Operations and Guidelines contains FBI procedures and policies as to the various civil investigations.

FBI guidelines governing investigative procedures of Civil Rights, Election Laws, and Involuntary Servitude and Slavery cases are set forth in the Manual

of Investigative Operations and Guidelines. In most cases, these FBI guidelines have been developed through DOJ instruction or DOJ approval of FBI recommendations modifying prior procedures. Frequently, initial and/or additional investigation in these areas is conducted pursuant to instructions by either the Civil Rights or Criminal Divisions of the Department of Justice. Also, the results of all Civil Rights, Election Laws, and Involuntary Servitude and Slavery cases are provided to the Civil Rights or Criminal Divisions of the Department.

Question. What Departmental or FBI guideline procedures or policies are available that govern the conduct of applicant investigations?

Answer. Concerning applicant investigations, Departmental Order 1732.1 establishes the personnel security regulations of the Department of Justice which require security investigations to develop information as to whether employment or retention in employment by the Department is consistent with the interests of national security. Departmental Order 1732.2 specifies positions within the Department of Justice which shall be subject to full field background investigations by the FBI. Such investigations are conducted on specific requests received from the Office of the Associate Attorney General.

Departmental Order 288–62 sets forth the rules concerning applications for executive clemency and provides for the FBI to conduct these investigations at the request of the Pardon Attorney.

By letter dated January 16, 1973, the Attorney General authorized the FBI to accept requests for background investigations directly from the Administrative Office of the U.S. Courts and to furnish results directly to that agency.

Various agreements setting forth criteria for background-type investigations have been developed through the Attorney General which govern the conduct of inquiries for the White House and certain congressional committees.

The FBI's Manual of Investigative Operations and Guidelines sets forth in detail in Part II, section 17, the objective and scope of applicant-type background investigations. Part I of this manual also contains specific instructions which apply to investigations conducted under individual classifications (e.g. 77, Departmental Applicants and 161, Special Inquiries).

Office of the Attorney General
Washington, D. C. 20530

DEC 15 1976

TO: Clarence M. Kelley
Director
Federal Bureau of Investigation

FROM: Edward H. Levi
Attorney General

SUBJECT: USE OF INFORMANTS IN DOMESTIC SECURITY, ORGANIZED CRIME, AND OTHER CRIMINAL INVESTIGATIONS

Courts have recognized that the government's use of informants is lawful and may often be essential to the effectiveness of properly authorized law enforcement investigations. However, the technique of using informants to assist in the investigation of criminal activity, since it may involve an element of deception and intrusion into the privacy of individuals or may require government cooperation with persons whose reliability and motivation may be open to question, should be carefully limited. Thus, while it is proper for the FBI to use informants in appropriate investigations, it is imperative that special care be taken not only to minimize their use but also to ensure that individual rights are not infringed and that the government itself does not become a violator of the law. Informants as such are not employees of the FBI, but the relationship of an informant to the FBI imposes a special responsibility upon the FBI when the informant engages in activity where he has received, or reasonably thinks he has received, encouragement or direction for that activity from the FBI.

To fulfill this responsibility, it is useful to formulate in a single document the limitations on the activities of informants and the duties of the FBI with respect to informants, even though many of these limitations and duties are set forth in individual instructions or recognized in existing practice.

As a fundamental principle, it must be recognized that an informant is merely one technique used in the course of authorized investigations. The FBI may not use informants

where it is not authorized to conduct an investigation nor may informants be used for acts or encouraged to commit acts which the FBI could not authorize for its undercover Agents. When an FBI informant provides information concerning planned criminal activity which is not within the investigative jurisdiction of the FBI, the FBI shall advise the law enforcement agency having investigative jurisdiction. If the circumstance are such that it is inadvisable to have the informant report directly to the agency having investigative jurisdiction, the FBI, in cooperation with that agency, may continue to operate the informant.

A. Use of Informants

In considering the use of informants in an authorized investigation, the FBI should weigh the following factors --

1. the risk that use of an informant in a particular investigation or the conduct of a particular informant may, contrary to instructions, violate individual rights, intrude upon privileged communications, unlawfully inhibit the free association of individuals or the expression of ideas, or compromise in any way the investigation or subsequent prosecution.

2. the nature and seriousness of the matter under investigation, and the likelihood that information which an informant could provide is not readily available through other sources or by more direct means.

3. the character and motivation of the informant himself; his past or potential involvement in the matter under investigation or in related criminal activity; his proven reliability and truthfulness or the availability of means to verify information which he provides.

4. the measure of the ability of the FBI to control the informant's activities insofar as he is acting on behalf of the Bureau and ensure that his conduct will be consistent with applicable law and instructions.

5. the potential value of the information he may be able to furnish in relation to the consideration he may be seeking from the government for his cooperation.

B. Instructions to Informants

The FBI shall instruct all informants it uses in domestic security, organized crime, and other criminal investigations that in carrying out their assignments they shall not:

1. participate in acts of violence; or

2. use unlawful techniques (e.g., breaking and entering, electronic surveillance, opening or otherwise tampering with the mail) to obtain information for the FBI; or

3. initiate a plan to commit criminal acts; or

4. participate in criminal activities of persons under investigation, except insofar as the FBI determines that such participation is necessary to obtain information needed for purposes of federal prosecution.

Whenever the FBI learns that persons under investigation intend to commit a violent crime informants used in connection with the investigation shall be instructed to try to discourage the violence.

C. Violations of Instructions and Law

1. Under no circumstances shall the FBI take any action to conceal a crime by one of its informants.

2. Whenever the FBI learns that an informant used in investigating criminal activity has violated the instructions set forth above in furtherance of his assignment, it shall ordinarily notify the appropriate law enforcement or prosecutive authorities promptly of any violation of law, and make a determination whether continued use of the informant is justified. In those exceptional circumstances in which notification to local authorities may be inadvisable, the FBI shall immediately notify the Department of Justice of the facts and circumstances concerning the investigation and the informant's law violation, and provide its recommendation on reporting the violation and on continued use of the informa: The Department shall determine:

a. when law enforcement or prosecutive authorities should be notified of the law violation;

b. what use, if any, should be made of the information gathered through the violation of law, as well as the disposition and retention of such information; and

c. whether continued use should be made of the informant by the FBI.

3. Whenever the FBI has knowledge of the actual commission of a serious crime by one of its informants unconnected with his FBI assignment, it shall ordinarily notify the appropriate law enforcement or prosecutive authorities promptly to make a determination whether continued use of the informant is justified. In those exceptional circumstances in which notification to local authorities may be inadvisable, the FBI shall promptly advise the Department of Justice of the facts and circumstances concerning the investigation and the informant's law violation, and provide its recommendation on reporting the violation and on continued use of the informant. The Department of Justice shall determine:

a. when law enforcement or prosecutive authorities should be notified of the law violation; and

b. whether continued use should be made of the informant by the FBI.

4. In determining the advisability of notifying appropriate law enforcement and prosecutive authorities of criminal activity by FBI informants the FBI and the Department of Justice shall consider the following factors:

a. whether the crime is completed, imminent or inchoate;

b. seriousness of the crime in terms of danger to life and property;

c. whether the crime is a violation of federal or state law, and whether a felony, misdemeanor or lesser offense;

d. the degree of certainty of the information regarding the criminal activity;

e. whether the appropriate authorities already know of the criminal activity and the informant's identity; and

f. the significance of the information the informant is providing, or will provide, and the effect on the FBI investigative activity of notification to the other law enforcement agency.

Office of the Attorney General
Washington, D. C. 20530

November 4, 1976

TO: Clarence M. Kelley
Director
Federal Bureau of Investigation

FROM: Edward H. Levi
Attorney General

SUBJECT: Domestic Security Investigation Guidelines

As a result of our continuing consultation during the initial implementation of the domestic security guidelines several questions have arisen regarding the means of implementing specific techniques used to collect information about groups or individuals under investigation. Taking into account your experience with the guidelines to date, as well as the complex factual situations in which these provisions must be applied, I think it would be useful to supplement the initial guidelines with more specific instructions in applying these sensitive techniques. The guidelines on domestic security investigations provide that in conducting preliminary and limited investigations, the FBI may make inquiry of existing sources of information and use of previously established informants, but informants may not be recruited or placed in groups. In this context "previously established informants" are those currently used in an active status. These provisions do not preclude:

1. Asking an informant, or any other source, including a potential criminal informant:

   a. What knowledge he already has concerning a group under preliminary or limited investigation, or

   b. To make inquiries concerning such a group, without attending the group's meetings or joining in its activities;

2. Directing a previously established informant to attend and report on open meetings of a group under preliminary or limited investigation. This direction to attend meetings does not require prior approval of FBI Headquarters.

3. Directing a previously established informant to attend and report on closed meetings of a group under the following limited circumstances:

   a. The group is a faction or splinter group of a parent organization which is already under full investigation; or

   b. The invitation to attend is initiated solely by the group itself, and that group is already under preliminary or limited investigation.

   Provided, direction of an informant to attend closed meetings pursuant to this paragraph requires prior approval of the SAC. Prompt subsequent notification shall be furnished to FBI Headquarters whenever an informant attends a closed meeting under these circumstances, either at the direction of the FBI or on his own initiative.

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DOMESTIC SECURITY INVESTIGATIONS

I. BASES OF INVESTIGATION

A. Domestic security investigations are conducted, when authorized under Section II(C), II(F), or II(I), to ascertain information on the activities of individuals or the activities of groups, which involve or will involve the use of force or violence and which involve or will involve the violation of federal law, for the purpose of:

(1) overthrowing the government of the United States or the government of a State;

(2) substantially interfering, in the United States, with the activities of a foreign government or its authorized representatives;

(3) substantially impairing for the purpose of influencing U.S. government policies or decisions:

(a) the functioning of the government of the United States;

(b) the functioning of the government of a State; or

(c) interstate commerce.

(4) depriving persons of their civil rights under the Constitution, laws, or treaties of the United States.

II. INITIATION AND SCOPE OF INVESTIGATIONS

A. Domestic security investigations are conducted at three levels -- preliminary investigations, limited investigations, and full investigations -- differing in scope and in investigative techniques which may be used.

B. All investigations undertaken through these guidelines shall be designed and conducted so as not to limit the full exercise of rights protected by the Constitution and laws of the United States.

Preliminary Investigations

C. Preliminary investigations may be undertaken on the basis of allegations or other information that an individual or a group may be engaged in activities which involve or will involve the use of force or violence and which involve or will involve the

FBI/DOJ

violation of federal law for one or more of the purposes enumerated in IA(1)-1A(4). These investigations shall be confined to determining whether there is a factual basis for opening a full investigation.

D. Information gathered by the FBI during preliminary investigations shall be pertinent to verifying or refuting the allegations or information concerning activities described in paragraph IA.

E. FBI field offices may, on their own initiative, undertake preliminary investigations limited to:

1. examination of FBI indices and files;

2. examination of public records and other public sources of information;

3. examination of federal, state, and local records;

4. inquiry of existing sources of information and use of previously established informants; and

5. physical surveillance and interviews or persons not mentioned in E(1)-E(4) for the limited purpose of identifying the subject of an investigation.

Limited Investigations

F. A limited investigation must be authorized in writing by a Special Agent in Charge or FBI Headquarters when the techniques listed in paragraph E are inadequate to determine if there is a factual basis for a full investigation. In addition to the techniques set forth in E(1)-E(4) the following techniques also may be used in a limited investigation:

1. physical surveillance for purposes other than identifying the subject of the investigation;

2. interviews of persons not mentioned in E(1)-E(4) for purposes other than identifying the subject of the investigation, but only when authorized by the Special Agent in Charge after full consideration of such factors as the seriousness of the allegation, the need for the interview, and the consequences of using the technique. When there is a question whether an interview should be undertaken, the Special Agent in Charge shall seek approval of FBI Headquarters.

G. Techniques such as recruitment or placement of informants in groups, "mail covers," or electronic surveillance, may not be used as part of a preliminary or a limited investigation.

H. All preliminary and limited investigations shall be closed within 90 days of the date upon which the preliminary investigation was initiated. However, FBI Headquarters may authorize in writing extension of a preliminary or limited investigation for periods of not more than 90 days when facts or information obtained in the original period justify such an extension. The authorization shall include a statement of the circumstances justifying the extension.

Full Investigation

I. Full investigations must be authorized by FBI Headquarters. They may only be authorized on the basis of specific and articulable facts giving reason to believe that an individual or a group is or may be engaged in activities which involve the use of force or violence and which involve or will involve the violation of federal law for one or more of the purposes enumerated in IA(1)-IA(4). The following factors must be considered in determining whether a full investigation should be undertaken:

(1) the magnitude of the threatened harm;

(2) the likelihood it will occur;

(3) the immediacy of the threat; and

(4) the danger to privacy and free expression posed by a full investigation.

Investigative Techniques

J. Whenever use of the following investigative techniques are permitted by these guidelines, they shall be implemented as limited herein:

(1) use of informants to gather information, when approved by FBI Headquarters, and subject to review at intervals not longer than 180 days; provided,

(a) when persons have been arrested or charged with a crime, and criminal proceedings are still pending, informants shall not be used to gather information concerning that crime from the person(s) charged; and

(b) informants shall not be used to obtain privileged information; and where such information is obtained by an informant on his own initiative no record or use shall be made of the information.

(2) "mail covers," pursuant to postal regulations, when approved by the Attorney General or his designee, initially or upon request for extension; and

(3) electronic surveillance in accordance with the requirement of Title III of the Omnibus Crime Control and Safe Streets Act of 1968.

Provided that whenever it becomes known that person(s) under surveillance are engaged in privileged conversation (e.g., with attorney), interception equipment shall be immediately shut off and the Justice Department advised as soon as practicable. Where such a conversation is recorded it shall not be transcribed, and a Department attorney shall determine if such conversation is privileged.

NOTE: These techniques have been the subject of strong concern. The committee is not yet satisfied that all sensitive areas have been covered (e.g., inquiries made under "pretext;" "trash covers," photographic or other surveillance techniques.)

III. TERMINATING INVESTIGATIONS

A. Preliminary, limited, and full investigations may be terminated at any time by the Attorney General, his designee, or FBI Headquarters.

B. FBI Headquarters shall periodically review the results of full investigations, and at such time as it appears that the standard for a full investigation under II(I) can no longer be satisfied and all logical leads have been exhausted or are not likely to be productive, FBI Headquarters shall terminate the full investigation.

C. The Department of Justice shall review the results of full domestic intelligence investigations at least annually, and shall determine in writing whether continued investigation is warranted. Full investigations shall not continue beyond one year without the written approval of the Department. However, in the absence of such notification the investigation may cont: for an additional 30 day period pending response by the Department.

IV. REPORTING, DISSEMINATION, AND RETENTION

A. Reporting

1. Preliminary investigations which involve a 90-day extension under IIH and limited investigations under IIF, shall be reported periodically to the Department of Justice. Reports of preliminary and limited investigations shall include the identity of the subject of the investigation, the identity of the person interviewed or the person or place surveilled, and shall indicate which investigations involved a 90-day extension. FBI Headquarters shall maintain, and provide to the Department of Justice upon request, statistics on the number of preliminary investigations instituted by each field office, the number of limited investigations under IIF, the number of preliminary investigations that involved 90-day extensions under IIH, and the number of preliminary or limited investigations that resulted in the opening of a full investigation.

2. Upon opening a full domestic security investigation the FBI shall, within one week, advise the Attorney General or his designee thereof, setting forth the basis for undertaking the investigation.

3. The FBI shall report the progress of full domestic security investigations to the Department of Justice not later than 90 days after the initiation thereof, and the results at the end of each year the investigation continues.

4. Where the identity of the source of information is not disclosed in a domestic security report, an assessment of the reliability of the source shall be provided.

B. Dissemination

1. Other Federal Authorities

The FBI may disseminate facts or information obtained during a domestic security investigation to other federal authorities when such information:

(a) falls within their investigative jurisdiction;

(b) may assist in preventing the use of force or violence; or

(c) may be required by statute, interagency agreement approved by the Attorney General, or Presidential directive. All such agreements and directives shall be published in the Federal Register.

2: State and Local Authorities

The FBI may disseminate facts or information relative to activities described in paragraph 1A to state and local law enforcement authorities when such information:

(a) falls within their investigative jurisdiction;

(b) may assist in preventing the use of force or violence; or

(c) may protect the integrity of a law enforcement agency.

3. When information relating to crimes not covered by paragraph IA is obtained during a domestic security investigation, the FBI may refer the information to the appropriate lawful authorities if it is within the jurisdiction of state and local agencies.

4. Nothing in these guidelines shall limit the authority of the FBI to inform any individual(s) whose safety or property is directly threatened by planned force or violence, so that they may take appropriate protective safeguards.

5. The FBI shall maintain records, as required by law, of all disseminations made outside the Department of Justice, of information obtained during domestic security investigations.

C. Retention

[1. The FBI shall, in accordance with a Records Retention Plan approved by the National Archives and Records Service, within _____ years after closing domestic service investigations, destroy all information obtained during the investigation, as well as all index references thereto, or transfer all information and index references to the National Archives and Records Service.]

[NOTE: We are not yet certain whether empirical data exists to help define a period of retention for information gathered in preliminary or full investigations. Whatever period is

determined should take into account the retention period for other categories of information (e.g., general criminal, organized crime, and background checks); since we have not yet considered these areas we cannot fix a period for retention at this time.]

[NOTE: It may also be possible to establish a sealing procedure to preserve investigative records for an interim period prior to destruction. After being sealed, access would be permitted only under controlled conditions.]

[2. Information relating to activities not covered by paragraph IA obtained during domestic security investigations, which may be maintained by the FBI under other parts of these guidelines, shall be retained in accordance with such other provisions.]

[3. The provisions of paragraphs one (1), and two (2) above apply to all domestic security investigations completed after the promulgation of these guidelines, and apply to investigations completed prior to promulgation of these guidelines when use of these files serves to identify them as subject to destruction or transfer to the National Archives and Records Service.]

4. When an individual's request pursuant to law for access to FBI records identifies the records as being subject to destruction or transfer under paragraph one (1), the individual shall be furnished all information to which he is entitled prior to destruction or transfer.

REPORTING ON CIVIL DISORDERS AND DEMONSTRATIONS
INVOLVING A FEDERAL INTEREST

I. Basis for Reports and Investigations

The Federal Bureau of Investigation is responsible for reporting information on civil disturbances or demonstrations in four categories:

A. Investigating --

1) violations of federal criminal law directed explicitly at civil disorders (e.g. 18 U.S.C. 231, 2101); and

2) violations of federal criminal law of general applicability occuring during civil disorders.

B. Providing information and assistance, upon request of the Secret Service, to aid in carrying out its protective responsibilities under 18 U.S.C. 112, 970, 3056 and P.L. 90-331.

NOTE: Under 18 U.S.C. 112 and 3056 the Secret Service is assigned responsibility to provide protection to certain U.S. Government officials and foreign officials and visitors. P.L. 90-331 provides Secret Service protection for candidates for office and authorizes Secret Service to call on any federal agency to assist in this regard. Responsibility for protection of foreign missions is assigned to the Executive Protection Service under the direction of the Secret Service. This accounts for the reference to 18 U.S.C. 970 dealing with damage to foreign missions.

C. Providing information concerning actual or threatened civil disorders which may require the presence of federal troops to enforce federal law or federal court orders (10 U.S.C. 332, 333) or which may result in a request by State authorities to provide federal troops in order to restore order (10 U.S.C. 331).

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NOTE: The statutes cited provide three bases for the use of troops in connection with civil disorders. Section 332 authorizes troops, at Presidential initiative, to enforce federal law and was the basis for the use of troops to protect the mail in the Pullman strike. Section 333 deals with the use of troops to protect civil rights and enforce court orders and was the basis for using troops at Little Rock and Oxford. Section 331 permits the President to send troops at the request of a State when State authorities cannot restore order, e.g. the Detroit Riot.

D. Providing information relating to demonstration activities which are likely to require the federal government to take action to facilitate the activities and provide public health and safety measures with respect to those activities.

NOTE: While there is no specific statutory authority for collection of information in these circumstances, the Second Circuit recognized in Fifth Avenue Peace Parade Committee v. Kelley, 480 F.2d 326, cert. denied, 415 U.S. 948, that the federal government has a legitimate need for information concerning demonstrations planned at federal facilities in order to provide services in connection with the demonstration. For example, considerable information was needed in order to fashion an appropriate permit for the November 1971 moratorium march in Washington, D.C.

II. Criminal Offenses

A. Investigation of criminal offenses referred to in paragraph I.A. shall be undertaken in the manner provided for in guidelines relating to criminal investigations generally.

B. Information concerning criminal offenses within the investigative jurisdiction of the FBI which is acquired incidentally in the course of implementing parts III through V, shall be handled in the manner provided for in guidelines relating to criminal investigations generally.

C. Information concerning criminal offenses within the investigative jurisdiction of another federal agency which is acquired incidentally in the course of implementing parts II through V, shall be reported to the agency having jurisdiction.

D. Information concerning serious criminal offenses within the investigative jurisdiction of State or local agencies which is acquired incidentally in the course of implementing parts II through V shall be reported to the appropriate lawful authorities.

NOTE: Using the criteria now applied by NCIC, the reference to serious offenses would exclude such matters as: drunkeness, vagrancy, loitering, disturbing the peace, disorderly conduct, adultery, fornication, and consensual homosexual acts, false fire alarm, non-specific charges of suspicion or investigation, traffic violations, and juvenile delinquency.

E. Information relating to criminal offenses acquired in the course of implementing parts II through V shall be retained and indexed as provided for in guidelines relating to criminal investigations generally.

III. Assisting the Secret Service

A. Information relating to the protective responsibilities of the Secret Service described in Paragraph I.B, which is acquired incidentally by the FBI in the course of carrying out its responsibilities, shall be reported to the Secret Service. The FBI shall not undertake specific investigations for the purpose of assisting the Secret Service in its protective responsibilities without a specific request from the Director of the Secret Service or his designee, made or confirmed in writing.

NOTE: The Department should undertake to review with the Secret Service existing agreements on the dissemination of information from the FBI to the Secret Service. The draft report of the General Accounting Office indicates that very little information reported by the FBI is actually retained by Secret Service.

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B. A record shall be made of all information reported to the Secret Service pursuant to paragraph III.A. and the record shall be retained by the FBI for five years.

NOTE: This is the standard Privacy Act accounting requirement.

C. Information reported to the Secret Service may be retained by the FBI for a period of ____ years.

NOTE: The retention period for this information will be considered in a general review of retention under all the guidelines.

IV. Civil Disorders

A. Information relating to actual or threatened civil disorders acquired by the FBI from public officials or other public sources, shall be reported to the Department of Justice.

B. The FBI shall not undertake investigations to collect information relating to actual or threatened civil disorders except upon specific request of the Attorney General or his designee. Investigations will be authorized only for a period of 30 days but the authorization may be renewed, in writing, for subsequent periods of 30 days.

C. Information shall be collected and reported pursuant to paragraphs A and B above for the limited purpose of assisting the President in determining whether federal troops are required and determining how a decision to commit troops shall be implemented. The information shall be based on such factors as:

1) The size of the actual or threatened disorder -- both in number of people involved or affected and in geographic area;

2) The potential for violence;

3) The potential for expansion of the disorder in light of community conditions and underlying causes of the disorder;

4) The relationship of the actual or threatened disorder to the enforcement of federal laws or court orders and the likelihood that State or local authorities will assist in enforcing those laws or orders;

5) The extent of State or local resources available to handle the disorder.

D. Investigations undertaken, at the request of the Attorney General or his designee, to collect information relating to actual or threatened civil disorders shall be limited to inquiries of:

1) FBI files and indices;

2) Public records and other public sources of information;

3) Federal, State and local records and officials;

4) Established informants or other established sources of information.

Interviews of individuals other than those listed above, and physical or photographic surveillance shall not be undertaken as part of such an investigation except when expressly authorized by the Attorney General or his designee.

E. Information relating to civil disorders, described in paragraph C above, shall be reported to the Department of Justice and may also be reported to federal, state or local officials at the location of the actual or threatened disorder who have a need for the information in order to carry out their official responsibilities in connection with such a disorder.

F. Information acquired or collected pursuant to paragraphs A through D above may be retained by the FBI for a period of _____ years but may not be indexed in a manner which permits retrieval of information by reference to a specific individual unless the individual himself is the subject of an authorized law enforcement investigation.

NOTE: Retention period to be fixed later: indexing limit to be implemented immediately.

V. Public Demonstrations

A. Information relating to demonstration activities which are likely to require the federal government to take action to facilitate the activities and provide public health and safety measures with respect to those activities, which is acquired incidentally by the FBI in the course of carrying out its responsibilities, shall be reported to the Department of Justice.

B. The FBI shall not undertake investigations to collect information with respect to such demonstrations except upon specific request of the Attorney General or his designee.

C. Information collected and reported pursuant to paragraphs A and B above shall be limited to that which is necessary to determine:

1) The date, time, place and type of activities planned;

2) The number of persons expected to participate;

3) The intended mode of transportation to the intended site or sites and the intended routes of travel;

4) The date of arrival in the vicinity of the intended site and housing plans, if pertinent;

5) Similar information necessary to provide an adequate federal response to insure public health and safety and the protection of First Amendment rights.

NOTE: Clause 5 above is intented to encompass such additional facts affecting the federal responsibility as unusual health needs of participants, counter-demonstrations planned which may increase safety needs, or possible inability of participants to arrange return transportation.

D. Investigations undertaken to collect information relating to demonstrations pursuant to paragraph B above shall be limited to determining the information

described in paragraph C. Such information shall be collected only by inquiries of:

1) FBI files and indices,

2) Public records and other public sources of information,

3) Federal, state and local records and officials,

4) Persons involved in the planning of the demonstration, provided that in conducting interviews with such persons the FBI shall initially advise them specifically of the authority to make the inquiry and the limited purpose for which it is made.

E. The FBI shall not undertake to photograph any demonstration or the preparation therefor in carrying out its responsibilities under paragraph V.

F. Information acquired or collected pursuant to paragraphs A through D above may be retained by the FBI for a period of ____ years but may not be indexed in a manner which permits identification of an individual with a particular demonstration or retrieval of information by reference to a specific individual, unless the individual himself is the subject of an authorized law enforcement investigation.

NOTE: Retention period to be fixed later; indexing limit to be implemented immediately.

Senator KENNEDY. The subcommittee will need those to see how this issue is being addressed in the charter.

Attorney General BELL. You will be involved, but we will make it clear that we do not need too many specifies in the statute because you ought to have the statute and the guidelines both, with the manual. Going back to what I would take away from the Bureau, I think we miss a point if we do not have in mind that the Bureau is constantly reassessing what they ought to be doing. For example, this year we are getting out of the business of apprehending military deserters. We did that by letter to the Department of Defense. We are getting out of that business. We are not out of it all together, but we are in the process of getting out of it.

We are trying, for example, to shift bank robberies to the States wherever we can. We find that we are having some success in urban areas. But the Bureau for 2 or 3 years has been reassessing its role. That is what they call the "quality over quantity program." So, that has not got to do with jurisdiction, but it has to do with the mission, I would call it.

I have described in very broad terms issues which we are considering in relation to an FBI charter.

Senator KENNEDY. When can we expect to see the draft charter?

Attorney General BELL. They have been working on the charter since the first day I got here. They always tell me how hard it is. My assistant tells me we have a long way to go. They need decisions from me. But I will get with them and we will get it out. I think we have worked on it long enough. We can do it, or else it is impossible. I will tell you about one or the other. [Laughter.]

I suspect it is possible.

Senator KENNEDY. When can we expect that, toward late summer or early fall?

Attorney General BELL. Let me ask my assistant about July 1. Let us say July 1.

Senator KENNEDY. All right.

Attorney General BELL. My assistant, Mary Lawton, is not in agreement with that, but we will say July 1 for the record.

Senator KENNEDY. It would be enormously helpful to see it by that time. That would give us an opportunity to review it before we begin preparing a committee draft.

Attorney General BELL. Just a moment, Senator. Let me check that July 1 date. They tell me that we can give it to you by July 1, but I do not have specific proposals to make to you today. Indeed, I have not resolved many of the questions in my own mind, that is because they have not rolled up all the questions to me. I know we have to take great care not to overlook something.

It is important to begin thinking about these matters now, however, and to develop a dialog between the legislative and executive branches. We must not underestimate the complexity of drafting a proper, fair, and effective charter for the FBI. It will take some time to reach decisions in all of the areas in which statutory guidance is needed and to draft language to implement those decisions effectively. Perhaps it will be necessary to legislate in stages, taking a few pressing issues at a time and attempting to find legislative resolutions for them.

In my judgment, you have made a wise decision in undertaking to assess the full dimensions of charter legislation in exploratory hearings such as this before attempting to draft any specific proposal. I pledge the full cooperation of the Department of Justice and the FBI in working with you to develop a lasting and comprehensive charter. Mr. Chairman, that is all I have by way of a prepared statement. Judge Webster is here, too.

Senator KENNEDY. All right, let us hear from Judge Webster.

STATEMENT OF WILLIAM H. WEBSTER, DIRECTOR, FEDERAL BUREAU OF INVESTIGATION, ACCOMPANIED BY JAMES B. ADAMS, ASSOCIATE DIRECTOR, AND JOHN J. McDERMOTT, ASSISTANT TO THE DIRECTOR, DEPUTY ASSOCIATE DIRECTOR OF ADMINISTRATION

Director WEBSTER. I have a brief statement before starting.

I would like to say that I listened very attentively to the Chairman's opening remarks. I was very much impressed by the one which you set for these proceedings. I want you to know that you will have the full cooperation of the FBI.

Senator KENNEDY. Thank you.

Director WEBSTER. Mr. Chairman, and members of the committee, I welcome this opportunity to meet with you and to discuss a matter of vital concern to all of us: a charter for the Federal Bureau of Investigation that will delineate the nonintelligence functions of our work. I need not repeat what Attorney General Bell has testified about this morning, namely, the statutes upon which the FBI presently relies for its investigative and service activities. Neither is it necessary to restate the varied functions presently being performed by the FBI. These are well known to the committee and its staff.

However, I do wish to reemphasize some of the concerns noted by the Attorney General. The FBI urgently needs a clear and workable statement of its responsibilities, power, and duties. The men and women of the Bureau need a charter that will allow them to act with confidence that what they are doing is lawful. It should be one that does not allow for any future misunderstanding of authority. The present statutory sources that establish our jurisdiction are not sufficiently definitive. There are not sufficient benchmarks to permit our agents to act or refuse to act with certainty that their conduct is correct.

History tells us that reliance on inherent authority has been a major contributor to some of the sad events that have been fully chronicled. As I have stated previously before this committee, anyone asked to go out on the point ought to know that the order is based upon law and clear authority. Reliance on inherent authority presents the all-too-possible risk that legal authority may not, in fact, be there. But while a charter for the FBI demands specificity, it cannot be inflexible. It should not be so rigid that it denies the FBI an ability effectively to carry out its mission of combating crime and violence in our Nation.

It should not reach down so far into our activities that it becomes a substitute for Attorney General guidelines. It should not confuse

a definition of fundamental functions with a manual of investigative procedures that properly remain with the FBI.

Obviously, there is no simple formula that will permit this committee, the Department of Justice, or the FBI to identify and compartmentalize material that should be in a charter, Attorney General guidelines, or an FBI operating manual. Yet, this is a matter of great and practical importances. Times change, emergencies appear, and investigative priorities change. Perhaps operational guidelines of the Department of Justice can be changed to meet the unexpected. But how readily can a charter of Congress change?

Senator KENNEDY. That is part of the dilemma; if the guidelines keep changing, then we will be back where we were. How can we strike a balance here?

Director WEBSTER. In answer to that question, Mr. Chairman, I think we have to decide what types of areas should remain clearly flexible. I think the charter, itself, could provide for specific types of guidelines and if the Congress chooses, it could provide certain types of oversight of those guidelines. I think that would be the best test to be followed. Good analogs, I think, can be found in the Truth-in-Lending Act with regulation Z; in 10(b)(5) regulations for the Securities and Exchange Act; and even possibly, the rules of criminal procedure.

I just suggest those as possible analogs, but I recognize there is a genuine concern by this committee. The concerns are mutual; so, too, should the task of creating a meaningful charter be mutual. To this end, I pledge the continued cooperation of the FBI in assisting the Department of Justice and the Congress in this endeavor. So, too, do I pledge my allegiance and that of the FBI to both the letter and the spirit of the legislation that Congress enacts.

If I may be of further assistance to the committee, or Associate Director James B. Adams—who is present here today—or Mr. McDermott as well, I would be happy to answer additional questions at any time.

Mr. Chairman, I hope that from time to time you will invite me back to express departmental views as we proceed to resolve these problems. I hope we will be able to submit specific proposals for inclusion in the charter, and perhaps be able to submit, through the Attorney General, some model forms which might be worthy of consideration.

At this time, I would like to submit for the record a biography of James B. Adams, my Associate Director.

Senator KENNEDY. Fine, thank you.

Without objection, so ordered.

[See appendix for biography of James Adams.]

Senator KENNEDY. I want to thank you very much, Judge Webster. We will look forward to taking advantage of that opportunity. I think this will be an evolutionary process and it should be a creative one which will take the best minds of the Department, the FBI, this subcommittee, and other interested Members of Congress. We will look forward to working closely with you.

Let me review with you some problem areas, and I would like to invite your response to these. Maybe Attorney General Bell or you

yourself could respond to them. We understand the importance and need for a charter, and think it is extremely reassuring to hear your comments. I would like to hear the scope you think the charter ought to have, and what specificity it should have. The first is, Attorney General Bell talked about the role of the Bureau in conducting the domestic security investigations? You have commented on this in your formal presentation, then you expanded on this in your informal remarks. Is there any other agency beside the FBI which should be involved in work on domestic security investigations?

Attorney General BELL. The Secret Service, I would say. Yes; I would say the Secret Service.

Senator KENNEDY. But should it be limited to those two agencies?

Attorney General BELL. Well, that is one of the interagency problems I was alluding to. The A.T. & F., for example, has jurisdiction over bombings. To give you a good example of that, we have had a number of bombings in the Miami area. The A.T. & F. was there in charge. Senator Stone telephoned me a number of times and said he wanted to get the FBI in. I said: "Well, we do not have jurisdiction. That statute is left to the A.T. & F." I finally did get the FBI into Miami, but it was only after we found a violation of civil rights. There was a very severe violation where the bombings blew the legs off of a newspaper editor. On that basis, we sent in the FBI. So we have both.

Then you have a problem of who is in charge. That is a domestic security matter. There are various types of these domestic security matters.

Senator KENNEDY. What criteria does the A.T. & F. use and what is the investigative standard?

Mr. ADAMS. They handle explosives basically.

Senator KENNEDY. But in investigations, do they use the "nexus of crime," or "probable cause," or what? Do all of the Federal investigative agencies involved in domestic security investigations use the same standards?

Attorney General BELL. I doubt it. I do not think Secret Service would. I do not want to speak for them, but they have a different role to protect. They are trying to protect the President and other high Government officials. They are really not investigating crimes, as such. Is that not a fair statement?

Mr. ADAMS. Yes.

Senator KENNEDY. Outside of the Secret Service, would they all have the same standard?

Attorney General BELL. I think so, yes. Insofar as I know, they do. I notice sometimes on the wiretap list they will have some of these unusual agencies, like the Department of Agriculture. They have enforcement people checking violations of law themselves. This is quite a long list, but they are all trying to find violations of the law, and they would refer to us, for prosecution, anything they find.

Senator KENNEDY. That certainly would be understood. But the question is this: What criteria are all the various investigative agencies using in domestic investigations, outside the jurisdiction of the Secret Service. Do they have different criteria?

Attorney General BELL. I think I spoke too fast, because I really do not know that. I know about the FBI and the DEA. That is all I

have jurisdiction over. So I would not want to speak for the others. I think, though, that might well be what the committee wants to know.

Senator KENNEDY. It seems we ought to have some definitive comment on this. Obviously we would need your help and assistance in defining what that ought to be.

Attorney General BELL. I was just talking with Mary Lawton. We will try to get that up to the committee.

Senator KENNEDY. Very well.

Without objection, so ordered.

[See appendix for material cited above.]

Senator KENNEDY. Does the standard differ from that used in the foreign counterintelligence investigations?

Attorney General BELL. Oh, yes; just as we have a different standard in the Surveillance Act, which you will be voting on today.

Senator KENNEDY. Yes; we start at 11:30.

Attorney General BELL. The standard would be different; yes. In the Surveillance Act, we are now encompassed in a criminal standard, that is, there are shades or variations in the standard, but it is still a criminal standard. I guess in that sense we are getting ready to say that everything is going to be on a criminal standard.

Senator KENNEDY. Are you getting ready to say it?

Attorney General BELL. We do not say it now. As you know, we have had quite a debate about that.

Senator KENNEDY. That is right.

Attorney General BELL. It has been with you and others. We finally decided that we could do it within the parameters of the criminal standard.

Senator KENNEDY. I think that was a very constructive and, quite frankly, an indispensible addition to the legislation.

Director WEBSTER. May I interject, Mr. Chairman?

Senator KENNEDY. Certainly.

Director WEBSTER. The distinction has to be made throughout the charter as to the difference between foreign counterintelligence responsibilities and domestic security investigations, both of which are intelligence gathering, and both of which may ultimately require a Federal standard for the basis for investigation. But our responsibilities in foreign counterintelligence go beyond those of domestic security investigations in that we have a responsibility there to neutralize the impact of foreign efforts to gather intelligence in this country, whereas we have no such responsibility to neutralize activities in domestic security.

Senator KENNEDY. You had better elaborate on your meaning of "neutralize."

Director WEBSTER. Yes; we do not engage in other than investigative activities in connection with domestic security investigations. It is our responsibility to minimize the impact of foreign counterintelligence by confusion, by any type of activity which will, in effect, destroy the spy effort of foreign nations. It is a different function. That is why they are very carefully separated.

Senator KENNEDY. You previously took preventive action; but you do not at the present time. Is that correct?

Director WEBSTER. Preventive action in domestic security would be legitimate in the sense that if we identified a conspiracy to do some-

thing, then we would take action to stop it. But we would not be diffusing the organization with fictitious mail or taking any other steps of that type. It is sometimes called "dirty tricks." In foreign counterintelligence, we do engage in legitimate efforts to confuse foreign activities, and to make them consume substantial amounts of their available time wondering about the effectiveness of their operation.

Senator KENNEDY. Can you tell us how the charter should define the FBI's responsibility in this area? I do not expect you to define it totally here, but can you tell us what you think the charter ought to say in this area, and how it ought to define the FBI's responsibility?

Director WEBSTER. Are we talking about foreign counterintelligence?

Senator KENNEDY. I would be interested in both domestic and foreign counterintelligence.

Director WEBSTER. The preamble portions to the Attorney General guidelines would be a good beginning point. Those responsibilities could be defined in terms of what our purpose, that is, our legitimate interest in intelligence gathering would be in domestic security, for instance, and what types of organizations we could legitimately investigate for intelligence-gathering purposes. The guidelines themselves might very well deal with the types of investigations that would be permitted against a given backdrop or parameter of circumstance or level of proof. I find it very difficult to try to articulate something in this area. We are going to have to submit drafts to you, then we can discuss the drafts.

Senator KENNEDY. All right; that is fine.

[At press time, the material requested from the Department had not been received by the subcommittee.]

Senator KENNEDY. Should the FBI have statutory authority to investigate civil disorders at the request of the Attorney General or the President?

Director WEBSTER. Are you asking whether we should have that?

Senator KENNEDY. Do you have that authority now?

Director WEBSTER. I think we do have it, but it is the kind of authorization that, as the Attorney General has said, and as I tried to indicate, is sometimes not clear and is very general. We have had to bootstrap lift in order to carry out our assigned responsibilities in those areas.

Attorney General BELL. We do not have it unless it is a Federal crime being committed, or has been committed, or is about to be committed, or that we expect will be committed. As Judge Webster knows, and Jim Adams knows, we are asked to send the FBI. Contrary to the things you might believe, Senator, the FBI is a very popular organization. If something happens bad somewhere, then people immediately want to get the FBI in. We spent a lot of our time wondering if we can send the FBI somewhere. We cannot always send them. Of course, we try to follow the law.

Civil disorder is where there is disorder in the eye of the beholder. We had a civil disorder, I guess, when Iranian demonstrations were going on. That was not handled by the FBI. It was handled by the Park Police, but it was serving the Government here. The President directed me to take over. I got Mr. Adams to start observing the

situation to see just what was going on and to see what could be done which had not been done. But by the time we got into it, it was over with. We never really did have to do anything about it.

In the Hanafi Muslim case, that itself could certainly be called a disorder, but it was a crime also, so there was no problem. In that case, we assisted the District of Columbia Police. They handled it and we assisted them and stood by and did everything we could help them.

When these cases come up, each stands on his own feet, and you have to decide what you can do.

We had a problem in the coal strike with people blocking railroads. There are different kinds of disorders like that going on. They are crimes, in some instances. We only observed. We never really did anything beyond that because the State police were there. Most everything that came up was in the province of the State police rather than in our jurisdiction.

Senator KENNEDY. Obviously, this is an extremely important and enormously sensitive area. Are you saying there ought to be only general guidelines for civil disorder cases?

Attorney General BELL. I would say, and I guess we have done this, we would take all the statutory jurisdictions that we have, which are very sparse. Then there are a lot of things and duties that are bestowed upon the Bureau by other statutes. We get all that together. We could, I suppose, sit down with the top management of the Bureau, and try to think of all the things that we have been asked to do over the years and see how they fit into this charter. I think we can come up with a charter.

Senator KENNEDY. An important area in civil disorder cases is what limitations on collection and dissemination of information you have. What standard do you use at the present time?

Director WEBSTER. We are presently using a need-to-know standard. If it is within the legitimate area of local law enforcement responsibility, then, we, in a cooperative way, have disseminated that information to the local enforcement officers.

But we have always satisfied ourselves that it fell within their jurisdiction and was of legitimate interest to them.

Senator KENNEDY. What standard is used for election of information on a domestic group?

Director WEBSTER. If I can complete my answer on dissemination, we are also accountable to the Privacy Act, which has certain limitations. With respect to your second question, the present guidelines provide:

> The domestic security investigations are conducted to ascertain information on activities of individuals or activities of groups which involve, or will involve, the use of force or violence or which involve, or will involve, a violation of the Federal law.

Then four categories are set forth. First is overthrowing the U.S. Government or a State government.

Second is substantially interfering in the United States with activities of a foreign government or its authorized representatives.

Third is a series of categories which summarize substantially impairing for the purposes of influencing U.S. Government policy decisions.

Fourth is depriving persons of their civil rights under the Constitution, or laws or treaties of the United States.

Those are the activities which, under the guidelines, we have a legitimate interest in investigating. Then there are a series under the guidelines, and I think probably they should stay under there, of threshold information, that is, in other words, how far and in what way can we investigate. These depend upon the amount of information that we have at that time. For example, we are not presently authorized to penetrate an organization by putting an informant in place for the purpose of conducting a preliminary investigation to see what they are up to. We have to have formal information of the likelihood of criminal activity before we are authorized to engage in that type of activity. If we get a hearsay report that they are up to no good, we can initially conduct a record check, which is essentially a record check of our own records to see what we know about them.

Senator KENNEDY. Is that the same criteria you use in domestic security cases?

Director WEBSTER. Yes.

Senator KENNEDY. I am specifically interested in the criteria for just civil disorder cases not related to just domestic security. Do you make a distinction?

Mr. ADAMS. Senator, in civil disorders, the main obstacle that is encountered to the collection and retention of information is the Privacy Act, which prohibits the collection or maintenance of any information which would be first amendment protected activity, unless it is directly related to an investigative activity. The civil disturbance area is an example of what Judge Bell was talking about as to how we have had to sit around and decide whether we can get in or can we not. The only time that we have conducted a civil disorder or disturbance investigation, since the guidelines were established in 1976, was the Bicentennial celebration in Philadelphia where we did have information that groups, which we had under full investigation, were planning to commit violence. In fact, the information was such that the State of Pennsylvania had requested Federal troops. That was not honored because it was our considered opinion that there was not a likelihood, based on information available to us, that the situation was so serious as to warrant it.

But in the other situation where we had the Iranian demonstration, although we did not conduct a civil disorder or demonstration investigation, we did have certain groups under investigation which were participating. We disseminated that information to the Park Police because we had indications that violations of law were about to take place, and, in fact, did take place. This comes under our general dissemination policies whereby if, during the conduct of any domestic security investigation or foreign counterintelligence information, we develop information which is within the investigative jurisdiction of another law enforcement agency or which would indicate the immanance of an act or completed criminal act. Then we do have the authority to disseminate that information.

Director WEBSTER. Mr. Chairman, there are three areas I think the committee might want to be concerned with, with respect to civil disorder chartering. First, of course, to make clear our jurisdiction is

an important consideration. Then you might want to set up a requirement that these investigations be under the authority of the Attorney General.

The committee may then want to set out provisions for reporting requirements so that you have a clear record of oversight, but I think these are obvious areas that you may want to look into.

Senator KENNEDY. All right.

Are these the April 1976 guidelines?

Director WEBSTER. Yes.

Senator KENNEDY. But that was for conducting domestic security investigations. Why have not there been similar guidelines for civil rights and applicant investigations?

Attorney General BELL. We have been drawing guidelines, as I understand it, for about 2 years, as fast as we can draw them. We may not have gotten to that. Doubtless we will have a guideline on everything we do.

Senator KENNEDY. Is it your intention that they will be covered by new guidelines?

Attorney General BELL. Oh, yes. We want to get a general charter provision. Then we will use guidelines. Let me say something I meant to say earlier. We have an operating agreement now with your committee. We file these guidelines 2 weeks in advance of their taking effect. That gives the committee a chance to work them over. We can work out a better system than that, maybe.

Senator KENNEDY. Having drafted those guidelines and having begun to comply with them, do you find them unduly restrictive or troublesome?

Mr. ADAMS. In domestic security?

Senator KENNEDY. Yes.

Mr. ADAMS. From an investigative standpoint, we find that the guidelines are adequate. We feel that they do provide the basis for conducting the hard-core type investigation which we feel is necessary for the purpose of domestic security.

We have had discussions with the Attorney General in terms that there are areas that trouble us at some point which we cannot overcome. This is something like a constitutional problem or a sensitivity problem. Yet, it still does present some sort of a problem to us.

For instance, there are organizations which intend to overthrow the Government by force and violence. We have recognized that intent. We have commented upon that intent. But yet, their actions have not moved from the first amendment protected activity of advocating such. Therefore, we are not in a position under the guidelines, and, we see no way to bring it under the guidelines to conduct an investigation of that organization or maintain any information on that organization because of these restrictions. There are some who say this is unwise because of the fact if you know when someone intends to overthrow the Government, you may not be in a position to even prevent him from even having access to employment in sensitive positions in the Government.

Yet, on the other hand, we have to consider the immediacy of that threat and the magnitude of the harm and the likelihood. In our opinion, we reach a conclusion that it does not meet these tests, and, therefore, we do not conduct the investigation. I merely point that out from the standpoint that in proceeding, as we have, and as far as we have,

we certainly do not want to give any false assurances that we may be able to prevent certain types of activity which could be prevented under broader guidelines. But we have no problems with the guidelines we feel are adequate as drawn.

Senator KENNEDY. What problems do you see in codifying these guidelines?

Mr. ADAMS. We do see a problem from an investigative standpoint in that, as alluded to in Judge Webster's statement, there is the fact that when something is written into law, the ability to change that promptly in order to react to the demonstrated need is limited. We feel that investigative guidelines—which get down to the level of actually conducting the behavior of our agents on the streets who do not walk around with manuals in their pockets—that that type of specific definition should be retained in the form of guidelines which can constantly be reviewed and subjected to congressional oversight to be sure that we are accommodating Congress and the executive branch.

Senator KENNEDY. Part of our dilemma is how can we be sure the guidelines will not be changed when we have changes of administrations, or officials at the agencies involved? This is part of the dilemma we face.

Attorney General BELL. On the other side, Senator, let me give you a good hypothetical situation: A person goes to an unfriendly foreign power and takes terrorist training. He takes training in terrorism and how to conduct terrorism. Let us say he does that in an extreme form. Let us say he comes back to this country and tends to his business and is law-abiding. He is just here. He has all the training but has not done anything. There is nothing we can do about that under our constitution.

Senator KENNEDY. Yes.

Director WEBSTER. I do not think this is going to be as much a problem as it might appear at first blush. Congress always has the final say. It has the privilege of preemption. The oversight committee is going to be aware of these guidelines. If there is dissatisfaction with them, the Congress always has the power to step in and be more precise in its charter.

Senator KENNEDY. That is giving us a lot of credit which is not wholly deserved.

[Laughter.]

Senator KENNEDY. I was a member of this committee when we had an FBI oversight committee which never met. We had a Director who never appeared. I think all of us have enormous confidence in you, Judge Webster, as well as Attorney General Bell. But this is an obvious concern that we have had. Now is the time to deal with it in a serious responsible way, as you have. I have seen too many times where these matters generate much public attention, and then they are put on the backburner. It then is very difficult to generate interest in the problems and to deal with the protections involved. That is why I wondered if you are able to live with the present guidelines and whether or not the Bureau has had problems carrying out its responsibility to deal with domestic security and terrorism problems.

Director WEBSTER. There are various investigative techniques that we currently have. I trust that as our technology increases, we will have even better techniques that will impact in unforeseen ways on privacy interests.

The conditions in our country change from time to time. Trying to cast up a hypothetical for which I will not be held responsible if I pick a bad one, the most important investigative tool that we possess is the use of our informant system. We are very proud of it. These are not co-opted informants. It is voluntary information. It is the most effective tool that we have. We could very easily penetrate a small organization with countless informants. We would not choose to do so even if we were not restricted by guidelines from doing so.

There might come a time in a particular area of stress or tension when the nature of the activity would be such that the guidelines would become too inflexible in terms of getting needed information in order to avert a very serious threat to life or property. It would be far easier to submit to the Attorney General for his consideration a modification of a guideline that precluded our use of an informant at a particular level of inquiry, given a radical change of circumstances, than it would be to come back to Congress for a legislative amendment. I do think that the charter should provide for ongoing oversight of any of those guidelines. That would give you your chance to step in if you felt that we were, in some way, abdicating our responsibility.

Senator KENNEDY. We will have a chance to work with you in that area. I think it will be a matter of concern that will have to be addressed. You mentioned investigative techniques. Would it not be helpful to write into the charter rather clear and specific authority on limitations to help agents know exactly what they can and cannot do, especially in light of recent instances?

Director WEBSTER. Where we all can agree that the principles are sound and that they are unlikely to change and that they can be defined in ways that validate certain types of activity and prohibit types of activity and where we see no reason why that would change, then I would be 100 percent in favor of putting it in the charter.

Senator KENNEDY. Would it be useful and helpful in protecting the men and women of the Bureau?

Director WEBSTER. Absolutely. I have that in mind.

Senator KENNEDY. Obviously, I think it has been a matter of concern to the members within the Bureau, and they are entitled to this protection.

Director WEBSTER. One of the areas that you may find is this. There is not complete unanimity of agreement in our own discussions. There is an area of concern to me and that is the activities of our undercover agents. This is a fairly recent development in the last few years. It is a very important development and one necessary to meet our commitment in organized crime. I can foresee situations in which a special agent would be called upon to do certain things within the organization he had penetrated, acting in an undercover capacity. There may be situations in which we would be required to do certain things in order to put him in that position.

We have been operating under Attorneys General's opinions as to the legality of those activities. On an ongoing basis we are conferring with the Attorney General and his staff with respect to particular situations, such as the use of credentials, for instance, that might violate a State law and whether or not that type of activity is illegal or legal.

Senator KENNEDY. What are the routine types of legal problems you have encountered?

Director WEBSTER. In undercover activity?

Senator KENNEDY. Yes; and organized crime. Are you talking about delivering a bribe or passing narcotics or what?

Director WEBSTER. That is a possibility.

We do not permit either our informants or our undercover agents to engage in any acts of violence.

But there is a possibility that, in order to assure his credibility with the organization, he is apt to carry a bag or do something of that kind.

Attorney General BELL. Let me give you an example of one that has been printed in the newspaper. We had the two undercover agents working with the Weathermen. They were asked to give marksmanship training. Mr. Adams brought it over to me for authorization in writing. That chilled my rights, I thought, right then, because I did not want to do it. These people have been underground, at least one of them has been underground for, I believe 4 years. So, I finally authorized him to teach marksmanship to these people, but to do it on a misinformation basis. [Laughter.]

They could teach them how to miss. [Laughter.]

They could teach them how to miss everytime. Fortunately, within 1 month after that they were able to apprehend these people just before they planted a bomb in front of a State senator's house.

Senator KENNEDY. How do you handle activities by the undercover agents where it would be a clear violation of the law?

Attorney General BELL. That is something we left out of the criminal code. It is a common law concept for that. The easiest example is that a police officer does not break the law when he carries a gun.

Mr. ADAMS. As Judge Bell mentioned, in that case that was one that was so sensitive it was presented to him personally. Also, in connection with this case, recognizing the various decisions that do come up in this area, which could not be covered in our manuals—and we cannot foresee day to day the type of decisions which have to be made from an investigative standpoint—we had a U.S. attorney specifically assigned to these undercover agents in order to give them the daily legal guidance necessary. This was so that their decisions could be reacted to promptly on the spot with the best understanding of the law as it exists. We are in constant contact with the U.S. attorneys and the departmental attorneys in these matters.

Attorney General BELL. Let me give you two quick examples. One would be false credentials. That would be against the State law and might be against the Federal law. Another would be the "sting" operations where we knowingly purchased stolen goods. That is against the law. We are doing that in the name of law enforcement. That is a law enforcement technique. These are under the jurisdiction of the Office of Legal Counsel.

Senator KENNEDY. Obviously there is a balance needed here. When do you get to the point of doing anything under cover of law?

Attorney General BELL. That is why you have a Director of the Bureau and an Attorney General.

Senator KENNEDY. Are we also going to have somthing in the charter on this, too? We recall problems with other Attorneys General.

Attorney General BELL. We ought to have something in the charter on allowing this public use concept if we can narrowly restrict it.

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Senator KENNEDY. Yes; but where are the limits? We recall a number of circumstances which were troublesome in the recent past. How do we deal with it and have the kind of flexibility for situations we cannot foresee? Obviously, the breaking of the law has to be a matter of enormous concern.

Director WEBSTER. I hark back to my original concept that if the charter expressly contemplates this type of needed activity and if it places on the Attorney General the responsibility for defining and approving, in advance, the activities to be conducted, and if it then provides for clear oversight and monitoring by the Congress, then I think we have come about as far as we can come.

Admiral Turner, in discussing the activities of the CIA, talked about oversight in terms of the public's surrogate. In a sense, our undercover activities can reasonably be dealt with in much the same way. You would be the surrogate for the people in this regard, Senator.

Senator KENNEDY. I understand in January, the Department issued guidelines for the use of informants. Will you have similar guidelines for mail covers, surveillance, interviews, undercover agents, undercover operations, and access to Federal and State agency records and third party records and files?

Director WEBSTER. Yes; I should think so. Some of those are already in place.

Attorney General BELL. Mary Lawton says that our guidelines provide that we have to follow the postal regulations.

Senator KENNEDY. Do you have guidelines for mail covers?

Attorney General BELL. We follow the postal laws. They have guidelines.

Director WEBSTER. We also have, I believe, some regulations with respect to the use of mail covers in foreign counterintelligence. Those require the approval of the Attorney General. Then we follow the regulations.

Senator KENNEDY. Will there be recommendations in the charter on these items?

[No response.]

Senator KENNEDY. Do you expect to make recommendations in the charter on the codification of mail covers, record access, and the use of investigative techniques.

Director WEBSTER. Yes, it is, Mr. Chairman.

Senator KENNEDY. Are there certain investigative techniques that your charter would virtually prohibit?

Director WEBSTER. Mr. Adams suggests to me that the bag job, as it was known, the illegal breaking and entering, would be an example. We would be subject to court authorized surrepetitious entries in those cases.

Attorney General BELL. I have not talked with Judge Webster or Mr. Adams about this, but I suspect that we ought to expand title 3 of the wiretap law and put some other things under that. We are doing that now in foreign intelligence. Maybe we ought to do more things by court order. However, we have been getting along well with the present arrangement.

Senator KENNEDY. We want you to take a look at title 3 and come back to us, hopefully after we pass this bill.

Attorney General BELL. I do not say we want to give up an investigative technique.

Senator KENNEDY. No; but we want to take a look at the troublesome areas. You made comments about the different agencies involved in law enforcement, and we will look forward to working with you on that. If we had more clearly defined procedures which would outline permissible investigative techniques as well as those which are prohibited, do you think we would be avoiding the situation that we are confronted with now; that is, the indicting of top echelon people and the disciplining of agents.

Attorney General BELL. Definitely. That has worried me from the very first day I became Attorney General. I have often wondered about this. If our system that we had in place at the time was so inadequate that the error could be committed, I wonder about it. Negligence could be committed, as distinguished from acting with criminal intent. I have wondered about that.

Director WEBSTER. The only caveat that I would add to that is that this not be one of those things that we used to know in the law. That is, if you mentioned a list, anything you did not mention is excluded because new technology will be developing as we go along. We see it every day. So if we validate a particular type of activity, the language of the charter should not imply that any other form would be illegal.

Attorney General BELL. Neither one of us can pronounce this Latin statement, but there is a Latin rule on that. [Laughter.]

Senator KENNEDY. Judge Bell, you mentioned in your statement:

> Perhaps it is time that Congress reexamine the question of whether the FBI should provide crime information in training State law enforcement agencies.

Do you think that activity should continue?

Attorney General BELL. Yes; I think so. That is this thing of message switching that ties in there. It gets everyone excited. What has happened, as I understand it, the States have a place in Phoenix, Ariz., where they gather data. I do not know if they are objecting to our doing it in order to save their own place, or what is going on. But surely there cannot be anything wrong with exchanging information to investigate and detect crime. The only objection would be the way we are doing it and the way it is proposed to be done. I think we need to get into that; yes.

Senator KENNEDY. Do you think the charter should define the relationship between the FBI, State, and foreign law enforcement agencies?

Attorney General BELL. I hope so; yes.

Senator KENNEDY. Precisely?

Attorney General BELL. Yes. We gain much more than we give in dealing with the foreign countries, and also with the States. It has to be a cooperative I thing. I think this is particularly true in a country such as ours where we have a dual system of law enforcement. It is more than dual. We have local, State, and Federal. We are the only country that has ever been, I guess, devised on that sort of basis. Sometimes we do not recognize that.

Director WEBSTER. The FBI depends heavily upon the cooperation of local law enforcement officers for the effectiveness of its own opera-

tions within the Federal jurisdiction. The Congress has seen fit, from time to time, to encourage us in that effort, particularly in the training of State law enforcement officers at the National Academy. I believe that is authorized under the Safe Streets Act. We want to be sure that those activities are considered, and, I trust, validated in the charter. The same can be said for some of our cooperative efforts which we have been doing from almost the beginning of time with foreign nations which have been very important as criminal activity is more mobile in today's society and more far reaching. I hope those will be clearly validated in the charter.

Attorney General BELL. Another example is Interpol. We have authority to be a member of Interpol.

Senator KENNEDY. The charter will spell out the authority for this exchange of information and also to foreign law enforcement agencies, and to State and local officials.

Director WEBSTER. Yes. In terms of dissemination of information, there are actually two areas there that should not be confused. One is supplying State and local law enforcement officers with information that should be of use to them, which is on a voluntary basis. The other falls in this category of information collecting which is called message switching. That is actually a capability, a computer capability, developed in the Bureau to be able to refer one State inquiring about a particular subject to another State which has information.

None of that information belongs to the Bureau. In fact, it is not kept in the Bureau. It is simply a computer method of expediting information from one State to another State. It is considered by the International Association of Police Chiefs to be a very vital tool. It has been held up because of misunderstandings and confusion about it. I hope it will be addressed along the way. But that is a different subject.

Attorney General BELL. I pose this question: If we cannot transmit it by computer, could you tell somebody about it? If Judge Webster knew that somebody in Missouri knew something that would help somebody in Arkansas, could he tell it? I am sure he could. Nobody would argue that. It is because we are afraid of computers that we have this concern. We all are. That, I think, is the root of the trouble over message switching.

Senator KENNEDY. We will deal with computer exchange of information and the privacy issue. Should the FBI conduct all the various types of criminal investigations which it does now? What are your thoughts on that?

Attorney General BELL. I do not know any myself that I want to give up or discontinue. These are experienced Bureau people. They may have different ideas. I do not want to preclude their views. I gave you my own. I have great faith in the Bureau myself and in what they are doing.

Senator KENNEDY. Are they working in all areas that they should, or are there some areas that should be dropped or are there some areas they should be in but are not?

Director WEBSTER. We were just talking among ourselves about the little things assigned to us like migratory bird authority. The question is: If we did not do it, who would do it? If it is a criminal law that needs to be enforced, then it has to be enforced by someone. Our view of it is that we probably are the best equipped.

Senator KENNEDY. Provide for us that list and let us take a look at it? I am talking about the more questionable ones.

Please submit that to us.

Director WEBSTER. Certainly.

Senator KENNEDY. Thank you.

Without objection, so ordered.

[The Department supplied the following response to the subcommittee:]

On April 20, 1978, during the appearance of William H. Webster, Director of the FBI, before the United States Senate Committee on the Judiciary, Senator Edward Kennedy discussed the issue of the numerous statutes which set forth violations that are investigated by the FBI. Senator Kennedy requested a list of statutes that could perhaps be dropped from the investigative jurisdiction of the FBI.

The FBI has jurisdiction over the following rarely investigated crimes:
Interstate Transportation of Prison Made Goods (18 U.S.C. 1761).
Interstate Transportation of Fireworks (18 U.S.C. 836).
Interstate Transportation of Unsafe Refrigerators (15 U.S.C. 1211).
Switch Blade Knife Act (15 U.S.C. 1241).
Federal Cigarette Labeling and Advertising Act (15 U.S.C. 1331).
Illegal Use of a Railroad Pass (49 U.S.C. 1).
Illegal Manufacture, Possession, or Wearing of a Civil Defense Insignia (50 U.S.C. 2284).
Illegal Manufacture, Sale, or Use of a Military Cremation Urn (18 U.S.C. 710).
Unauthorized Use of the Smokey Bear Symbol, Unlawful Reproduction or Use of the Character "Woodsy Owl" or Unauthorized Manufacture, Reproduction or Use of the Character "Johnny Horizon" (18 U.S.C. 711–714).
Illegal Manufacture, Use, Possession, or Sale of Emblems and Insignias, to Include Badges or Medals of (1) Veterans Organizations (18 U.S.C. 705), (2) 4–H Emblems (18 U.S.C. 707), (3) Merchant Marine and Seaman Decorations (46 U.S.C. 249), (4) Gold Star Lapel Buttons (36 U.S.C. 180).
Misuse of the name Peace Corps (22 U.S.C. 2518).

Many of the statutes within the investigative jurisdiction of the Attorney General would as a matter of Department of Justice policy be assigned to the FBI. The major violations within the investigative jurisdiction of the FBI have been assigned a classification within the FBI's administrative system. The FBI does not currently have a list of all the violations which could be assigned to the FBI, many of which include violations which rarely, if ever, are investigated.

Attorney General BELL. We particularly ought to address those that overlap another agency, like with the Wildlife Service. I did not know the FBI was into this. I did not realize we were protecting doves. [Laughter.]

Mr. ADAMS. We have been approaching it in the reorganization studies. We first have to determine: What is the mission of the FBI? Is it the basic law enforcement agency or not?

In trying to prevent proliferating matters under the processes in the past, anytime Congress passes a law, and no jurisdiction is attached to a specific agency, it rests with the FBI upon delegation from the Attorney General. So, there are a number of areas like this that could be addressed. But the first they would be: What is the basic role of the FBI?

Senator KENNEDY. Should the FBI be conducting civil rights investigations, should some other agency, or should the Civil Rights Division be hiring its investigators to do that work?

Director WEBSTER. The Attorney General might have a different view, but from what I can see, the FBI is doing an excellent job in this field. It supplies a neutral investigation in the development of facts. I think that its record in this area is outstanding.

The high professional level of the special agents assigned to this work gives them a better understanding of fairly complicated and sophisticated laws. My own view of it is that it is properly in the FBI.

Attorney General BELL. Let me say this, Senator, also. I have had to face this. When I first got to Washington, there was a good deal of estrangement between the Bureau and the Civil Rights Division. That has been alleviated, to some extent. I think Mr. Drew Days and Mr. Adams have helped it out a lot.

I remember in the South in the civil rights revolution of the sixties all the good work the Bureau did. Somewhere along the line I remember the case against Lynn in Hattiesburg, Miss. It went on for 1 week there. It was in a voting case. I remember I was on the court at the time. There were 29 agents who testified in that case. Somewhere toward the end of the civil rights revolution there were hard feelings developed between the Bureau and the Civil Rights Division.

I strongly disfavor giving anybody in the Justice Department any investigators. That is why the Bureau was created.

Beginning in 1870 when the Department of Justice was created, they had an appropriation for investigators. They got more and more investigators. Finally, in 1906 or 1908 they created what they called the Bureau of Investigation. Later in the thirties it became the Federal Bureau of Investigation. Now, it seems to me to be a capital error to go back to the old system and start separate investigators in some departments.

There are a lot of people in the Justice Department who would like to do that. I found one U.S. attorney's office, since I have been here, where they had hired 30-some-odd extra lawyers and were not using the Bureau. That is the only U.S. attorney's office I found doing that. But I do not favor it. That is a short answer.

Senator KENNEDY. I see. I want to thank all of you very much. We are just beginning the wiretap legislation on the floor, so I will have to excuse myself now.

Can you tell us before I go whether or not the Department has a task force working on this, Attorney General Bell?

Attorney General BELL. The Office of Legal Counsel, John Harmon, and the Assistant Attorney General is in charge of this problem of getting this draft up. Mary Lawton denies that they are a task force, but they have a force of some sort working on it.

[Laughter.]

Director WEBSTER. I have just authorized a working committee. Maybe that is a better name for it.

Senator KENNEDY. I see.

We will look forward to working with them in the same spirit that we have had on the recodification, and on wiretaps.

Mr. Adams and Mr. McDermott, I think, are coming back on Tuesday, April 25, for a second day of hearings on the charter. We will also have the Civil Liberties Union, which will testify as well.

Again, I want to thank you very much. It has been very helpful.

We stand in recess.

[Whereupon, at 11:05 a.m., the committee was adjourned.]

FBI STATUTORY CHARTER

TUESDAY, APRIL 25, 1978

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 10:30 a.m., in room 2228, Dirksen Senate Office Building, Senator Edward M. Kennedy (acting chairman of the committee) presiding.

Present: Senator Metzenbaum.

Staff present: Robert M. McNamara, Jr., counsel, Subcommittee on Criminal Laws and Procedures; and Ann Logan, staff assistant.

Senator METZENBAUM. Mr. Adams, I believe we will start the hearing now. I am sure Senator Kennedy will not mind. This will give me an opportunity to ask you a few of my questions.

STATEMENT OF JAMES B. ADAMS, ASSOCIATE DIRECTOR, FEDERAL BUREAU OF INVESTIGATION, ACCOMPANIED BY JOHN S. McDERMOTT, DEPUTY ASSOCIATE DIRECTOR OF ADMINISTRATION, AND JAMES O. INGRAM, DEPUTY ASSISTANT DIRECTOR, CRIMINAL INVESTIGATIVE DIVISION

Mr. ADAMS. Certainly.

Senator METZENBAUM. Do you, in your Identification Division, collect fingerprints from any and all entities that make them available to you?

Mr. ADAMS. It does serve as a central repository for fingerprint information from police departments around the country. They make their submissions. It is a voluntary act on their part. I do not know what you may have in mind, Senator, from any and all means.

Senator METZENBAUM. What is your policy about accepting in your Identification Division fingerprints that are offered to you by non-Federal entities? If the come in to you from a State or a municipal police department, do you just crank those right into your fingerprint bank?

Mr. ADAMS. Yes; providing they meet certain entry criteria.

Senator METZENBAUM. Are you familiar with the proposal being considered by SEARCH Group, Inc., a consortium of the 50 States and 3 territories, to limit the national identification of fingerprint program to submission by Federal and State agencies?

Mr. ADAMS. I would like to refer that question to Mr. McDermott who heads up the administrative side of our house which includes the Identification Division.

Mr. McDERMOTT. Senator, I have not had a chance to study the SEARCH Group, Inc. proposal in detail. But beyond the submissions from local police departments, we receive the fingerprint submissions from the military. We receive fingerprint submissions from the licensing authorities in State and local governments. We have the financial institutions who want to have a check of our fingerprint records made concerning prospective employees which, of course, is authorized by a specific statute. Beyond that, I do not know where your question is.

Senator METZENBAUM. Do you think that we ought to include in the national bank any set of fingerprints that are forwarded to you? Let us assume that somebody runs a garage or a filling station or a retail store. They start to take fingerprints of their employees. They send those in to you. Do you think all those should be made a part of your bank?

Mr. McDERMOTT. No, Senator, and they are not. If I may explain, let me say this.

The submission of a fingerprint card carries with it the implied request that the fingerprints be classified and searched against the criminal portion of our fingerprint card holdings which consist of approximately 76 million cards of our total 168 million cards.

We have an obligation, by law, to respond only to those agencies, Federal, State and local which are authorized to receive information from us. The private sector, unless specifically is made the subject of legislation, such as financial institutions——

Senator METZENBAUM. Do you mean national banks as provided for by law?

Mr. McDERMOTT. Yes. We would not respond to most private sector requests because we are not authorized to disseminate information to them.

Senator METZENBAUM. When you say that you have 168 million cards on file, does that mean covering 168 million individuals?

Mr. McDERMOTT. No, Senator. As of February 1, 1978, we had about 168.5 million cards. They are considered to represent approximately 64 million people. They are broken down into various types, criminal and civil, and military prints, and so forth.

Senator METZENBAUM. Would you distinguish for me how you have 64 million people and 168 million cards? I do not understand that.

Mr. McDERMOTT. There are occasions where we will maintain more than one card on a given individual.

Senator METZENBAUM. Why would you do that?

Mr. McDERMOTT. Well, again, I am not a fingerprint expert, and I hope you understand. I can arrange for a briefing in greater detail if you wish it. But, as I understand it, we retain all fingerprint cards submitted to us relating to arrests for serious or significant criminal offenses. On the other hand, fingerprints taken in connection with State statutes requiring fingerprint checks for employment and licensing are returned to the submitting agencies after being searched against the criminal portion of our files. In other words, we do not attempt to maintain individual fingerprint cards, in every instance where a set of prints is sent to us.

Senator METZENBAUM. You do not maintain that?

Mr. McDERMOTT. No.

Senator METZENBAUM. What are those 104 million cards that represent the difference between the 64 million people and the 168 million cards? I am a little confused. That is quite a few million cards.

Mr. McDERMOTT. What I am saying is that in some cases we maintain more than one card on a given individual. This is most commonly the case with reference to our criminal fingerprint card holdings. Of our total holdings of almost 168.5 million cards, about 76 million have been received concerning individuals charged with crimes. Those 76 million, approximately, are considered to represent 22 million people.

Senator METZENBAUM. Of the 76 million, that relates to the 22 million people?

Mr. McDERMOTT. Yes. So, you see the great majority of our fingerprint file holdings do not relate to individuals who are charged or have been charged with crimes.

Senator METZENBAUM. Say that again?

Mr. McDERMOTT. The great majority of our fingerprint card holdings do not refer to individuals who have been charged with crimes. Said in a different context, almost 92 million of our cards refer to something like 42 million persons whose fingerprints were submitted to us for a noncriminal purpose.

Senator METZENBAUM. For example?

Mr. McDERMOTT. Military. The millions of people who have served in the military have their fingerprint cards maintained in our civil fingerprint file. Also, individuals whose fingerprints are submitted in connection with applications for Federal employment would be maintained in that file.

Senator METZENBAUM. Can we draw the conclusion that you have two out of every three adult Americans on a fingerprint card? Would that be an accurate conclusion? I am assuming that there are 215 million people in America, and something like half of that are children. I do not know the actual statistics. But would that be true?

Mr. McDERMOTT. I would have to say the figures would be significantly lower than that, Senator, in that our total of approximately 64 million cards of all descriptions——

Senator METZENBAUM. No. You mean 64 million people.

Mr. McDERMOTT. I am sorry. Yes; 64 million people. That would only constitute roughly, 27 or 28 percent of the entire population.

Senator METZENBAUM. No. There are 215 million people, so that would amount to about 30 percent of the total population. But if you eliminate all the children in the population, whose fingerprints I would assume you do not have, then, it would seem to me, that the percentage would get up somewhere to 65 percent or something like that.

Mr. McDERMOTT. The figures are not as impressive as that for the reason that these prints have been collected since back in the twenties. Many of the individuals whose fingerprints are still included in there are since deceased.

We do have purging procedures. As we come across criminal prints of individuals who are 80 years old or older, they are automatically eliminated. The same is true of the civil prints of individuals 75 years old or older.

Again, you would wonder why we would keep prints that long. No. 1, there is the expense of purging where you have to hire hundreds of people just for the purpose of purging files. Second, there are benefits to be derived from the maintenance of these, such as in the case of missing persons and in the case of our sending our disaster squad out in the major disasters. There it is possible to compare fingerprints taken from the remains with cards on file. This has served a very fine purpose in the past.

Senator METZENBAUM. Mr. Chairman, I took the liberty of starting to ask questions before you arrived. If you do not mind, I will continue with a few.

Senator KENNEDY [entering]. Fine.

Senator METZENBAUM. Would you be good enough to advise the committee as to the percentage of adult Americans that you feel you presently have and for which you believe you presently have fingerprints?

Mr. MCDERMOTT. Senator, I would be delighted to have that studied. I am not optimistic that we could come up with a meaningful figure, but by all means I will have it studied.

Senator METZENBAUM. Thank you.

Senator KENNEDY. Without objection, so ordered.

[The following response was received by the subcommittee from the FBI:]

The FBI has started an indepth study to determine the percentage of adult Americans who are currently represented in the FBI's fingerprint files. At the conclusion of this study, this material will be furnished to the Senate Judiciary Committee.

[See appendix for additional response to the request for information referred to above:]

Senator METZENBAUM. You recently procured a computerized fingerprint file from Rockwell International; is that correct?

Mr. MCDERMOTT. We are under contract with Rockwell International for research and development of an automated index of names for our Identification Division and also a piece of technology that we call by the acronym FINDER, meaning FINgerprint reaDER. That equipment will have the capability of digitally reading and classifying a set of fingerprints and comparing one set of fingerprints with another automatically.

We have great expectations for this technology. We feel, in the long run, that it will be able to eliminate as many as 1,000 persons or more from our permanent staff in the Identification Division, which is now handling the fingerprint comparisons in a manual mode.

Senator METZENBAUM. Do you expect to store in the computer all the prints you presently hold, or only an unduplicated set?

Mr. MCDERMOTT. This becomes very complicated. We do not anticipate receiving as many duplicate fingerprint cards in the future. I am sure you are aware, Senator, of the present study on the computerized criminal history system, which proposes that computerized criminal histories be decentralized to the several States rather than having them maintained in our headquarters.

This is the matter of a task force study right now by members of the FBI, the Department of Justice, and representatives of congressional committees.

Senator METZENBAUM. What is the basis of your keeping prints of persons who have never been charged or convicted of any crime in your file on a permanent basis?

Why should the FBI have a record of law-abiding citizens and keep their fingerprints?

Mr. MCDERMOTT. There are thousands of citizens who have requested that their fingerprints be maintained by us so that in the event of missing persons and amnesia, or a catastrophic accident in an aircraft or a train wreck——

Senator METZENBAUM. You said thousands. You now have some 40-some odd million prints of people who have never been charged or convicted of any crime. Out of those 40-some odd million, would you think that the percentage who have requested you to keep their prints would be in excess of one one-hundredths of 1 percent?

Mr. MCDERMOTT. I would not guess, but I would guess it is miniscule; yes.

Senator METZENBAUM. So, therefore, my question is this. What is the basis and purpose of the FBI keeping prints on law-abiding citizens?

Mr. MCDERMOTT. The great majority of them, I would speculate, are based upon receipts from the military taken as people enter on duty with the military. This has gone on over the years, recognizing that part of our early fingerprint holdings was the transfer of military prints to us.

Of course, since then, over the years, submissions by all of the Federal executive branch agencies have been maintained.

Senator METZENBAUM. Since we do not live in a police state, would you think it would be appropriate that in the Federal charter or in the FBI charter, that we specifically provide that it is the intent of Congress for the continued use of files of persons who are no longer military and no longer Federal employees and who are law-abiding citizens? Should that be totally eliminated and purged from your files?

Or, would there be some contrary reason why there should be continued retention from the law-enforcement standpoint?

Mr. MCDERMOTT. I think the subject of your inquiry is too important to reach for a spontaneous handy answer. I would be very pleased to see a study made which would balance the advantages of retention against the disadvantages.

Senator METZENBAUM. I would be happy to have you do a study, but I hope we might get your response by the time we begin drafting an FBI charter. I feel, Mr. Chairman, that it would be most appropriate for the Congress to indicate to the FBI that there is no reason for them to retain fingerprints of persons who have never been charged with a crime and have never been found guilty of a crime and who are not in the Federal service, even though they may have been in the military service or something of that kind.

I see no reason for the law enforcement arm of the FBI to continue to maintain such files. I would hope that when we move toward a Federal charter that we might look more closely at the subject and perhaps address ourselves to it.

Mr. MCDERMOTT. If I may add, Senator, it should not be overlooked that this does constitute a data bank. I realize that word carries a certain degree of reprehensibility these days, but it does constitute

a data bank of fingerprint records against which comparisons can be made for a proper law enforcement purpose looking to the solution of crimes.

Senator METZENBAUM. Would you then think—if that is the case, would you then think we should go the other way? Would the FBI advocate a position to see that every American is fingerprinted?

Mr. MCDERMOTT. No, sir; I would not.

Senator METZENBAUM. Thank you very much.

Thank you, Mr. Chairman.

Senator KENNEDY. I welcome the Senator raising these questions. I think it is worth giving consideration to the proposal. It is well worth thinking about. I suppose one of the factors used in terms of fingerprints is freeing people from possible suspicions of crime. I suppose there is a variety of different kinds of factors. I think the Senator raises a very worthwhile issue and question. I think we ought to invite a response from the Department without the long study, but just a thoughtful response.

Senator, I suppose it might be worthwhile to put it in some kind of a letter.

Senator METZENBAUM. That would be excellent.

Senator KENNEDY. We could make that a part of the record, I suppose.

Mr. MCDERMOTT. We would be happy to submit that for the record.

Senator KENNEDY. Without objection, so ordered.

[The following response was received by the subcommittee from the FBI.]

The FBI has started an indepth study to determine the percentage of adult Americans who are currently represented in the FBI's fingerprint files. At the conclusion of this study, this material will be furnished to the Senate Judiciary Committee.

Senator METZENBAUM. Thank you, Mr. Chairman.

Senator KENNEDY. Before we proceed, and since I was late, I would like to read my opening statement now.

OPENING STATEMENT OF SENATOR KENNEDY

Senator KENNEDY. Today the Committee on the Judiciary is holding the second of a number of hearings on a statutory charter for the Federal Bureau of Investigation.

The focus of these hearings is to determine the appropriate scope and the required detail which the charter should have if it is to be an adequate definition of the Bureau's legislative mandate. Last Thursday, Attorney General Bell and Director Webster not only strongly supported the concept of a statutory charter, but also committed themselves and their resources to this effort. Their commitment is an important first step in beginning this difficult endeavor.

Today we welcome back Mr. James B. Adams, the Associate Director of the Federal Bureau of Investigation.

Good morning, Mr. Adams.

I would like to move to the area, first of all, of domestic security. These are some of the areas that we talked about last week. I want to get some greater detail. We were discussing domestic security and civil disorder investigations. I think there was some confusion about which guidelines we were talking about and the method in which these matters were investigated. I would like to see if we can clarify

that, if we could. Could you review with us, Mr. Adams, the difference between the domestic security and civil disorder investigations?

Mr. ADAMS. The domestic security guidelines basically provide the means by which we conduct investigations of individuals or organizations who are involved, or will be involved, in violations of Federal law and force and violence for certain stated purposes. These are the basic guidelines that apply to the investigation of such activities that we now have underway in the 12 organizations under investigation which are engaging in criminal activities, principally bombing activities. The guidelines on civil disorders and demonstrations are primarily for the purpose of providing that there is no interference with the basic first amendment protected activities which are often attendant to demonstrations, public demonstrations, and sometimes civil disorders, likewise.

It is to clearly define the limits of the Federal Government's interest which falls in areas whereby we can conduct and report, that is, conduct investigations and report on violations of Federal law that take place.

We can, under certain limited circumstances, conduct inquiries at the request of the Secret Service in connection with their responsibilities to protect the President. We can conduct inquiries for the purpose of determining the need for Federal troops under the President's powers, or upon the request of the State. These are the principal purposes under which these guidelines apply. As I mentioned at the last hearing, we have only had one occasion under the civil disorder and demonstration guidelines where the Attorney General has exercised his authority, which is specifically required to permit us to conduct such investigation.

That was in connection with the Bicentennial celebration where the State of Pennsylvania had raised questions concerning the potential for violence, and, in fact, had requested that Federal troops be provided in view of their estimates of impending violence. We concluded, based on information available to us, that the likelihood of such, and the need for such, was not demonstrated and, of course, the Government did not provide Federal troops.

On the other hand, the conditions were such that the Attorney General felt that an inquiry should be conducted to answer this question.

Under these guidelines, we are still required to report incidents which come to our attention on potential civil disorders which may involve violence. We do not go out and actively investigate to collect that information. However, if the police department in a city reports to us information that there is going to be a demonstration or a potential civil disorder resulting from the demonstration, then we do, upon having that information furnished to us, report it to the Department of Justice without taking any investigative action.

Those are basically the guidelines under which we operate. It is very limited as to what we can collect. The nature of the information that we collect is limited, and, in no way, are they as broad as the domestic security guidelines for conducting investigations.

Senator KENNEDY. How are each of these kinds of investigations initiated?

Mr. ADAMS. Generally the field office in a domestic security case has the authority to open a preliminary inquiry, based upon the receipt of allegations to the effect that individuals or organizations may be en-

gaging in these activities which involve the violation of Federal law and force and violence. Those preliminary inquiries that are opened are very limited as to the scope of the investigation conducted. It is primarily checks of records, our records and local police records, and activities which do not intrude very far into what you would call, or what we would normally refer to as "basic investigative activity."

The purpose of this inquiry is to determine whether there is a basis for a full investigation. Sometimes the questions cannot be answered with these preliminary inquiries. Under those circumstances, the field office, on the authority of the SAC or special-agent-in-charge, broadens it to include a couple of additional avenues of investigation. Again, this is solely for the purpose of determining whether there is a basis for a full and continuing type of investigation. In the limited investigation, or in the preliminary inquiry—where the surveillance can be conducted for the purpose of identity alone—a physical surveillance can be conducted for no other purpose than just determining the identity of the individual.

In the preliminary inquiry, the only interviews that could be conducted were very limited. Basically, we could check with the existing sources and information, use of established informants, that is, previously established informants, and interviews for the limited purpose of identifying the subject. In the limited investigation, we can extend that to interviews going beyond identifying the subject which would be to determine what his activities are. The limited and preliminary, of course, preclude the use of mail covers, electronic surveillance, and so forth, as part of that type of investigation. A preliminary investigation can only be continued for 90 days, and can be extended one time for an additional 90 days.

FBI headquarters must be advised, but does not have to approve the opening of the preliminary investigation. In moving to a full investigation, on the other hand, the full investigation can only be authorized by FBI headquarters, and it has to be on the basis of specific and articulable facts giving reason to believe that the individual or group is, or will be engaged in activities involving the use of force or violence in violations of Federal law for one or more of the stated purposes.

At that time, we have to move into considerations of the magnitude of the harm, the likelihood that it will occur, the immediacy of the threat, and the danger to privacy. Also, at the time that we initiate or authorize the full investigation, we must notify the Department of Justice within a week, and then at the end of 90 days submit to them a summary report. This investigation cannot continue beyond a year without approval of the Department. So, these basically are the levels of approval by which preliminary or limited inquiries or full investigations may be conducted.

Senator KENNEDY. How many of the full investigations are going on at the present time?

Mr. ADAMS. When we were here last week I think the figure then was 12 organizations and 61 individuals. Some of those may have been preliminary. I would have to check the record because that would include preliminary, limited, and full investigations.

Senator KENNEDY. Do you mean the 12 and the 61 include the preliminary as well as the full?

Mr. ADAMS. That is right.

Senator KENNEDY. Can you give us a breakdown?

Mr. ADAMS. We will submit that for the record.

Senator KENNEDY. That will be helpful.

Without objection, so ordered.

[The following response was supplied to the subcommittee by the FBI:]

There are 41 full domestic security investigations, one limited and one preliminary investigation for a total of 43 domestic security investigations concerning individuals.

Senator KENNEDY. If we are talking about the 12 investigations being a combination of full and preliminary, why should not that decision be made in terms of the preliminary at a higher level?

Mr. ADAMS. Well, we feel that the guidelines are such that a special agent in charge should have the authority to act on an allegation. The nature of the activity which can take place in the preliminary is so limited with the check of his office and the check of local and State police records. These are activities which do not intrude out into full investigative activity.

So, we have not seen fit, and the Attorney General has not suggested that the level of authority should be any higher than the special agent in charge on that.

Senator KENNEDY. I suppose in one sense that it is limited as you describe it, but in another sense it does include surveillance. In that sense of surveillance, it reaches the legitimate and lawful first amendment activity as well.

Mr. ADAMS. It should not. The surveillance should not. For instance, if an informant reported to us that an unnamed individual was attending a clandestine meeting of a group which is under full investigation, and, because of their activities and committing violence, if he advises us there is an unnamed individual there, then the field office could perhaps place him under surveillance. He would lead them from the meeting to his residence in order to determine his identity. This would be under the preliminary investigation guidelines. This, in my opinion, is not a very intrusive technique, and in relating it to the basic purpose involved, I think it is not being considered other than what is normal investigative activity.

Senator KENNEDY. How about the surveillance of open meetings? Would that be included in the preliminary investigation?

Mr. ADAMS. If we received an allegation that an organization met the criteria, without repeating it. But if it was just a general allegation with little degree of specificity from a source we would not just go out without some other reason to believe that.

But, if we received the allegation, we are permitted under the guidelines at the present time to utilize an established source or informant, an already existing informant, to attend public meetings, or meetings open to the public, of that particular organization to report back to us whether there is a basis for this allegation. The informant may also attend a closed meeting during the preliminary or limited investigation only upon invitation of someone in the organization whereby it would be inadvisable for him not to attend, that is the occasion in which he does that. So, we do have the potential, under the guidelines, for covering a public session, and under a very limited circumstance, a closed session.

Senator KENNEDY. That is really what I was driving at. You do have, under the preliminary investigation guidelines for doing the preliminary work, the opportunity, as you defined it, in the closed session to place under surveillance what may well be legitimate first amendment activities.

It would seem to me that in the preliminary sense that very well may be more of a chilling factor than further on down the road. I do not know. We are just feeling our way through this question. But these were the areas of concern of the things used in the past. Maybe you could review with us briefly the investigative, that is, the threshold investigative standards in each category.

Mr. ADAMS. In the preliminary investigation, it may be undertaken on the basis of allegations or other information that an individual or group may be engaged in the activities which we previously discussed.

In the full investigation, it must be on the basis of specific and articulable facts, giving reason to believe that an individual or organization falls within those stated activities.

Senator KENNEDY. Could the preliminary investigation take place with information from an unreliable informant?

Mr. ADAMS. We have informants that have furnished reliable and unreliable information.

Senator KENNEDY. What if you have a person like *that*?

Mr. ADAMS. If we receive information from such a person, before we would open an investigation, we would certainly have to consider the nature of the information, the degree of access he would likely have had to that information as to whether it is reliable or unreliable, and we would have to consider all other facts involved.

I think from the limited number of such investigations that we engage in, it shows the care and attention presently being given these matters that we do not, either in our field offices or our headquarters, encourage just running off willy-nilly, trying to stretch a guideline to the point to where we would be conducting unnecessary or unwarranted investigations.

We have a very small number. We also have considerable demands on our resources in all other areas of our operations. I think that considering the concerns which have been expressed and which are recognized in the guidelines for possible intrusions into protected activities that there is a very careful and determined effort to ensure that investigative activity is not initiated in this sensitive area unless it is fully warranted.

Senator KENNEDY. When does a domestic security investigation spill over and become a counterintelligence investigation?

I can see a situation where one might start off with civil disorder and move toward domestic security, and then to counterintelligence with a whole range of different thresholds that have to be met and a range of different techniques being available to the Bureau.

Mr. ADAMS. It does not happen very often. I know that since we initiated the guidelines, in the domestic security and foreign counterintelligence investigations, for example, we have only had one group of investigations that have moved, per se, from the domestic to the foreign field.

It is true that we have occasionally had individuals who are engaged in domestic activity, who, at some later point, become identified as

being involved in espionage or related activity which would move them to the foreign counterintelligence area.

I inquired the other day. Since the initiation of these guidelines in April 1976, the investigative activity on only one organization or group—and its attendant members—has been moved from the domestic to the foreign counterintelligence area. No one could recall any other specific individual cases that had been so moved.

Senator KENNEDY. You said just one; is that correct?

Mr. ADAMS. Right. It is one organization with attendant members and front groups.

Senator KENNEDY. What about from the other way, that is, the counterintelligence to the domestic security?

Mr. ADAMS. There have been none that I know of that have moved in that direction. I know of none that have been moved in the opposite direction.

Senator KENNEDY. We would like to see the organizations in executive session, that is, the organizations included in this list.

Let me move to this. Let us say that we have a speaker advocating political reform. Let us say that if that political reform does not occur, that people should take the matter into their own hands, or to forcibly change the Government.

Does that meet your threshold?

Mr. ADAMS. No, it does not. In fact, as I referred in one of our prior sessions, we do have this organization where the Attorney General has determined not advocacy, but intent to overturn the Government by force or violence. It consisted of about 71 members at the time, but all of their activities have been restricted to recruiting adherents to their cause, publishing their aims and statements, and recruiting in the factories. But no element of violence has taken place yet. We apply the magnitude of harm test. Sure, the magnitude is great if they could carry out their threat, but the likelihood is not great and the immediacy is not great.

All of these qualifying matters have to be applied. It was concluded that we had no authority to continue the investigation under the domestic security guidelines. This poses certain problems to us which we are still trying to address with the Department, which is the fact that by not being able to investigate the organization, we cannot target informants against it. We would then not know if they move from 71 individuals to 70,000 individuals unless at some point in time someone does become aware of it and reports it to us. We are concerned over our ability to accommodate this, which is unquestionably the proper decision concerning first amendment rights, with our responsibilities under Executive Order 10450. If members of this organization apply for sensative positions in Government, then we would not be able to maintain that information on them and report that information. This is indicative, I think, of the care which is presently being given this problem and the seriousness with which the procedures are being followed.

Senator KENNEDY. How do you tell if there is a group that differs with foreign policy decisions and threatens violence? How do you determine whether they are being directed by a foreign government?

Mr. ADAMS. Through informants, through individuals who can be aware, not only of the printed word of their——

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Senator KENNEDY. When do they come into play? If a group does suggest this, then do you activate your informant system?

Mr. ADAMS. No. If it does not meet that basic criteria——

Senator KENNEDY. How do you know whether it meets the basic criteria unless you do some kind of investigation?

Mr. ADAMS. No. 1, we have to rely pretty much, at the present time, upon committed acts to indicate violence. We have certain organizations that publicly take credit for their bombing acts, like the New World Liberation Front, which issues a communique every time they blow up a Pacific Gas & Electric Co. facility.

Our investigations, as you can tell from the number, are 12, and in executive session we will be very glad to demonstrate to you why these organizations came to our attention and why we reach that threshold and how we reach the threshold for a full investigation.

Senator KENNEDY. We would be interested, as well, in the ones where you did not move ahead in terms of an investigation. You must have a next group. You made a decision to do the top 12. What about the 12 cases below these. I do not know whether you rank them or not.

Mr. ADAMS. Do you mean organizations that we did have under investigation and then concluded them after a period of time?

Senator KENNEDY. Yes.

Mr. ADAMS. Yes, we have had those.

Senator KENNEDY. Maybe in executive session we could address those as well. I would be interested in the basis for not moving ahead and what information you did have which urges you to move ahead. We would like to get some sense about how these criteria are being implemented and the judgment that is being placed on various words in meeting that criteria.

Mr. ADAMS. That can be very easily demonstrated because of the violence in the organizations and the determination of it and the period of time by which we subsequently terminate the investigation.

Senator KENNEDY. What types of preventive action does the FBI take in the domestic security cases? We got into this area briefly the other day. Since the guidelines went into effect, has the FBI taken any preventive actions in domestic security cases or investigations?

Mr. ADAMS. Preventive action is a term that has to be pretty clearly defined. One of the best examples was in California recently where during our investigation of the Weather Underground we were able to penetrate the organization. By having live individuals within the organization, we became aware of a plot to engage in an assassination and a plot to engage in bombings.

We were able to prevent the action taking place because it reached the conspiratorial stage. It reached the conspiracy act, and actually reached the attempted bombing. The bomb was constructed. It was to be set off under the office of a State senator in California.

We had another case involving a group whereby, based on informant information within the organization, an antibusing situation, the guidelines were met because they were engaging in violence and denying people their civil rights. We became aware of a cache of grenades, explosives and weapons. We were able to prevent their use by seizing them through a search warrant. Again, arising out of a domestic security investigation, we have had an organization in New York under investigation that was engaged in harassing foreign diplomats and engaging in bombing activities.

Through penetration of the organization, we became aware of plans and were able to prevent those plans from taking place. In most instances, we try to pursue the matter until we can develop a prosecutable violation. This becomes a very delicate question at times as to whether we have sufficient control over this situation so that we can develop the case to a prosecutable standpoint. By taking these individuals off the street, we insure that they will not commit the act on a subsequent date as long as they are incarcerated.

In some instances, if you are unable to develop a prosecutable case, then it is necessary to just go out and interview the known participants in order to let them know that you are aware of their anticipated plans and hope that you discourage the activity in that regard.

Those are instances that come to mind.

Senator KENNEDY. Those are interesting examples. I suppose I would be interested in how many times, let us say, for the period of the last 18 months or the last 2 years, that this has taken place. Let us say that you were able to take preventive action. Specifically we would like to know about the actions that were taken. We would like to know about your own interpretation as to how the anticipated action was avoided. Is 2 years a reasonable period of time for you to check out?

Mr. ADAMS. That would be a reasonable time frame. I would like to cover that, if we may, at the same executive session because one particular item I have in mind is a current on-going situation which could be more appropriately discussed then.

Senator KENNEDY. Fine.

Mr. ADAMS. But I would like to assure you, Senator Kennedy, that when we are talking about preventive action, we are talking about it in this narrow area. We are not talking about the neutralization, disruption, and that sort of activity which took place during the COINTELPRO actions of years past.

Senator KENNEDY. Let me ask you this.

You will supply that information for us?

Mr. ADAMS. Yes.

Senator KENNEDY. It is important because the balance here is the type of threat to the rights of individuals covered by the first amendment covered in these domestic security questions.

You indicated in your testimony, as did Director Webster, that you take preventive actions in terms of protecting the lives of individuals as well as their security. I think it is important for us to try to evaluate what these factors are. I think that will be an important consideration for the committee. So, we would like to get that information from you and review it with you. We will do that in executive session.

Mr. ADAMS. I would be glad to.

Senator KENNEDY. Let me ask you this: On the issue of neutralizing the activities of domestic security groups, are any efforts made now to neutralize activities of domestic security groups?

Mr. ADAMS. No; not in the sense that it was used under the COINTELPRO actions.

Senator KENNEDY. How about outside that sense?

Mr. ADAMS. We would like to neutralize the activities of several violence-prone groups by successful prosecution of all the criminal

acts that have been committed. That is the only sense that I can say that we are interested in neutralizing the activities.

Senator KENNEDY. It has been suggested that paid informants or undercover agents can be used as a part of infiltrating the domestic security. Someone has suggested that a warrant, similar to a title III warrant, be required. Do you have any thoughts on this?

Mr. ADAMS. Well, I think that a warrant requirement for use of informants is impractical. I feel that there is no adequate way that you can devise a warrant procedure which would not almost negate the effectiveness of any informant program.

Senator KENNEDY. Why is that?

Mr. ADAMS. There are problems of notice when you get into warrants. There are problems of publication. There is the protection of the confidential relationship. There is the degree of specificity which would be required for probable cause, or some degree of cause. Informants are often used as extensions of an investigative prerogative. We do not have probable cause at the time that we investigate a problem. We have often only an investigator's years of experience and hunches that criminal activity is afoot. Recognizing certain signs, or recognizing certain behavorial patterns, cause an investigation in the criminal field to be initiated.

The attaching of a warrant requirement ignores the fact that an informant in a criminal case is already engaged in criminal activity in many different areas. We are contacting him on a regular basis to furnish us information that might come to his attention on a matter within our investigative jurisdiction.

We do not know beforehand what we can target him toward. He is out there seeking to ferret out Federal violations and trying to bring them to our attention due to his exposure.

I recognize that during the charter discussions that this issue is such a sensitive issue that it must be addressed. We fully intend to address it. But my initial impression, as we have discussed it over the past 3 years, because of various inquiries that have been made, we have found the problems almost insurmountable to still provide for effective use of human informants.

Senator KENNEDY. Would you draw any distinction between the use of them, let us say, in organized crime, in terms of white collar crime, as distinguished from the areas that involve the greater degree of First Amendment activities, in terms of the domestic security and civil disorder? Do you see any distinction?

Mr. ADAMS. I think some of the problems are still there. I guess what I keep coming back to is this. I have difficulty with the small number of informants we presently have in domestic security. It is less than 100 in a Nation of 200 million people.

I think our attention has been obtained most dramatically in the past few years in widespread investigations to possible abuses in the area of the use of informants, and so forth. We have tight guidelines. Even under the domestic intelligence provisions for utilizing informants, we have tight guidelines. Under the criminal use of informants, we also have tight guidelines.

I feel that with the guidelines that we now have that the sensitivities are being recognized and the individual rights are being recognized. We hate to say that we have reduced abuses to an irreducible mini-

mum, but I think the sheer numbers alone is a good indication of our efforts in that regard.

Senator KENNEDY. Perhaps you could submit something on the practical problems which you have touched on here.

Mr. ADAMS. Yes, we will.

Senator KENNEDY. Thank you.

Without objection, so ordered.

[The following response was received by the subcommittee from the FBI:]

OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C., December 15, 1976.

To: Clarence M. Kelley, Director, Federal Bureau of Investigation.
From: Edward H. Levi, Attorney General.
Subject: Use of informants in domestic security, organized crime, and other criminal investigations.

Courts have recognized that the Government's use of informants is lawful and may often be essential to the effectiveness of properly authorized law enforcement investigations. However, the technique of using informants to assist in the investigation of criminal activity, since it may involve an element of deception and intrusion into the privacy of individuals or may require Government cooperation with persons whose reliability and motivation may be open to question, should be carefully limited. Thus, while it is proper for the FBI to use informants in appropriate investigations, it is imperative that special care be taken not only to minimize their use but also to ensure that individual rights are not infringed and that the government itself does not become a violator of the law. Informants as such are not employees of the FBI, but the relationship of an informant to the FBI imposes a special responsibility upon the FBI when the informant engages in activity where he has received, or reasonably thinks he has received, encouragement or direction for that activity from the FBI.

To fulfill this responsibility, it is useful to formulate in a single document the limitations on the activities of informants and the duties of the FBI with respect to informants, even though many of these limitations and duties are set forth in individual instructions or recognized in existing practice.

As a fundamental principle, it must be recognized that an informant is merely one technique used in the course of authorized investigations. The FBI may not use informants where it is not authorized to conduct an investigation nor may informants be used for acts or encouraged to commit acts which the FBI could not authorize for its undercover Agents. When an FBI informant provides information concerning planned criminal activity which is not within the investigative jurisdiction of the FBI, the FBI shall advise the law enforcement agency having investigative jurisdiction. If the circumstances are such that it is inadvisable to have the informant report directly to the agency having investigative jurisdiction, the FBI, in cooperation with that agency, may continue to operate the informant.

A. USE OF INFORMANTS

In considering the use of informants in an authorized investigation, the FBI should weigh the following factors:

1. The risk that use of an informant in a particular investigation or the conduct of a particular informant may, contrary to instructions, violate individual rights, intrude upon privileged communications, unlawfully inhibit the free association of individuals or the expression of ideas, or compromise in any way the investigation or subsequent prosecution.

2. The nature and seriousness of the matter under investigation, and the likelihood that information which an informant could provide is not readily available through other sources or by more direct means.

3. The character and motivation of the informant himself; his past or potential involvement in the matter under investigation or in related criminal activity; his proven reliability and truthfulness or the availability of means to verify information which he provides.

4. The measure of the ability of the FBI to control the informant's activities insofar as he is acting on behalf of the Bureau and insure that his conduct will be consistent with applicable law and instructions.

5. The potential value of the information he may be able to furnish in relation to the consideration he may be seeking from the Government for his cooperation.

B. INSTRUCTIONS TO INFORMANTS

The FBI shall instruct all informants it uses in domestic security, organized crime, and other criminal investigations that in carrying out their assignments they shall not:

1. Participate in acts of violence; or
2. Use unlawful techniques (e.g., breaking and entering, electronic surveillance, opening or otherwise tampering with the mail) to obtain information for the FBI; or
3. Initiate a plan to commit criminal acts; or
4. Participate in criminal activities of persons under investigation, except insofar as the FBI determines that such participation is necessary to obtain information needed for purposes of Federal prosecution.

Whenever the FBI learns that persons under investigation intend to commit a violent crime informants used in connection with the investigation shall be instructed to try to discourage the violence.

C. VIOLATIONS OF INSTRUCTIONS AND LAW

1. Under no circumstances shall the FBI take any action to conceal a crime by one of its informants.

2. Whenever the FBI learns that an informant used in investigating criminal activity has violated the instructions set forth above in furtherance of his assignment, it shall ordinarily notify the appropriate law enforcement or prosecutive authorities promptly of any violation of law, and make a determination whether continued use of the informant is justified. In those exceptional circumstances in which notification to local authorities may be inadvisable, the FBI shall immediately notify the Department of Justice of the facts and circumstances concerning the investigation and the informant's law violation, and provide its recommendation on reporting the violation and on continued use of the informant. The Department shall determine:

(*a*) When law enforcement or prosecutive authorities should be notified of the law violation;

(*b*) What use, if any, should be made of the information gathered through the violation of law, as well as the disposition and retention of such information; and

(*c*) Whether continued use should be made of the informant by the FBI.

3. Whenever the FBI has knowledge of the actual commission of a serious crime by one of its informants unconnected with the FBI assignment, it shall ordinarily notify the appropriate law enforcement or prosecutive authorities promptly and make a determination whether continued use of the informant is justified. In those exceptional circumstances in which notification to local authorities may be inadvisable, the FBI shall promptly advise the Department of Justice of the facts and circumstances concerning the investigation and the informant's law violation, and provide its recommendation on reporting the violation and on continued use of the informant. The Department of Justice shall determine:

(*a*) When law enforcement or prosecutive authorities should be notified of the law violation; and

(*b*) Whether continued use should be made of the informant by the FBI.

4. In determining the advisability of notifying appropriate law enforcement and prosecutive authorities of criminal activity by FBI informants the FBI and the Department of Justice shall consider the following factors:

(*a*) Whether the crime is completed, imminent or inchoate;

(*b*) Seriousness of the crime in terms of danger to life and property;

(*c*) Whether the crime is a violation of federal or state law, and whether a felony, misdemeanor or lesser offense;

(*d*) The degree of certainty of the information regarding the criminal activity;

(*e*) Whether the appropriate authorities already knew of the criminal activity and the informant's identity; and

(*f*) The significance of the information the informant is providing, or will provide, and the effect on the FBI investigate activity of notification to the other law enforcement agency.

Senator KENNEDY. Just before leaving that question, Mr. Adams, let me say this: The courts have ruled on that question. I wonder whether perhaps we could devise a different procedure under title III or not? You commented about your concern for title III provisions and the inherent problems that are suggested by that. I am referring to the conduct of criminal investigations in terms of notice and the relevation of evidence and other factors. I wonder if a warrant procedure could be shaped different from title III to deal with some of these other considerations. Obviously these are preliminary examinations of some of these issues. We would like to search these out a bit more. We would like to pursue that issue in more detail.

Mr. ADAMS. That will be fine.

Senator KENNEDY. We might have suggestions, but it might be helpful to us to look closely at your response. You indicate that as a practical problem, you have difficulty in the warrant area.

Maybe we could write you a letter and give you some different alternative ways where a warrant procedure might be fashioned and get your response to that.

Mr. ADAMS. Certainly. I would be glad to respond.

Senator KENNEDY. Thank you.

Without objection, so ordered.

[The department supplied the following response to the committee.]

A request for information on how the FBI would be adversely affected by a warrant requirement in the use of informants. It is assumed an informant is a person who provides the FBI information in a continuing and confidential relationship concerning matters of investigative interest, and that the warrant requirement for the use of an informant will require an allegation of a violation of Federal law.

1. Informant who provides information of a criminal nature when received and is not targeted toward specific individuals or groups.

A warrant requirement for this type of informant would be unworkable. The persons contacted by the informant and the type of information developed are not known until after the fact. The FBI is presently operating several informants of this type who provide information including that used for criminal intelligence, identification of subjects, detection of crimes, probable cause for arrest and search warrants, and undercover activities.

2. Informant who provides information regarding a particular criminal group.

This type of informant is particularly valuable in organized crime investigations and investigations involving criminal groups whose criminal enterprise is particularly covert. The warrant requirement would cause difficulty if little were known regarding a group's specific activities. The question would have to be resolved whether a warrant would have to be obtained in order to attempt to develop an informant within a group and whether a warrant would be required to use on the existing informant to penetrate the group. This type of informant is used to develop information regarding the members of the group and their activities and to corroborate other investigations.

3. Informant used strictly for obtaining intelligence information who is unable or refuses to provide specific information regarding criminal violations.

Criminal intelligence information is critical to investigations involving groups whose organization and leadership are not known. The FBI is presently operating several informants who provide strictly criminal information regarding organized crime groups. A warrant requirement would complicate the use of such informants because of their limited value regarding the development of information concerning specific criminal violations.

4. Informant who is developed primarily to determine the extent of criminal activity in a particular geographical area or industry.

A warrant requirement for such an informant would be unworkable because the informant's value is to determine the extent of criminal activity and no specific allegations regarding criminal activity can be made prior to his activity.

5. Informant used to check reliability of a second informant.

This type of informant is necessary in determining what further steps can be taken based on another informant's information. This information includes that used for probable cause for a search warrant or title 3 affidavit which requires specific corroboration either to support the affidavit or to protect an informant. The warrant requirement would also be an undue complication in the use of this type of informant.

6. Informant who is in a position to provide information regarding local violations but refuses to deal directly with local authorities.

A warrant requirement here would be unworkable because no Federal violation could be alleged.

In addition to the above-described complexities of a warrant requirement, the fact a record will be made of the informant's activities and a return will be required present another possibility of informants being identified. Informants are vital to the overall success of the FBI's investigations and the warrant requirement would cause citizens to be reluctant to become involved. The warrant requirement constitutes an undesirable complication of criminal procedure which will benefit criminals to a greater degree than it will provide a protection of first amendment rights.

Senator KENNEDY. Yes; we will do that.

Last Thursday, one serious problem with undercover operations was discussed. This is the time in which the agents may be called upon to break the law or to participate in an illegal act. Judge Bell reviewed with us some of the common law holdings on this. Can you give some of the specific examples of the types of activity that we are talking about?

Mr. ADAMS. The most common case is false identity whereby there may be a State or local law forbidding the use of certain types of identification, that is, providing for proper authorization of certain types of identification. We provide them with false identification in order to carry out their investigative responsibilities.

Another area is in connection with some of our operations. We may buy stolen property. We will put an undercover agent in a position whereby he may buy one stolen tractor-trailer, and, instead of making the arrest at that time, we try to penetrate the organization.

So, we buy the stolen property and keep the operation going until at some point we can move up the line and determine who the conspirators are who are actually running the commercialized theft operation.

We have certain problems in running a business, let us say, and in having receipts and disbursements. There are certain Government regulations that when you receive money it immediately goes into the Treasury. We need to continue a viable operation. We cannot be on the losing end all of the time. We would soon run out of appropriations in that area. We have had occasions where agents participated in gambling operations in order—and I do not mean just violation of the local gambling laws, but in actual operation of a gambling facility—but we have to do this until we can make a case against high-level organized crime figures, which we did make successfully.

All of these have been covered generally by the court decisions which basically apply to narcotics. In one case, one undercover narcotics agent could sell narcotics to an individual who then sold it to another undercover agent. The courts have held that is legal. It is only when the activity becomes so outrageous that there does become a question of legality. But, yet, our people do have a rather great concern over their activities today, and would like to be assured that there is a recognition that some of these procedures are taking

place and that Congress does indicate its accommodation with the executive branch on it. But these are matters which we intend to explore in the charter formulations.

Senator KENNEDY. Do you have guidelines for undercover agents, especially in the area of illegal activity?

Mr. ADAMS. No; the Department has handled these matters on an ad hoc basis in the past. We should have had a tunnel under the street between the two buildings with all of the ad hoc decisions that have gone on in the past several years. So, Mr. Civiletti recently indicated that perhaps we could establish guidelines which would relieve the necessity of so many ad hoc decisions on these matter. At the same time, this would give our agents greater assurance by having guidelines in hand which they could readily see had been approved by the Department of Justice. Under our procedures, as Judge Bell mentioned last week, we would submit these to the Oversight Committee, likewise, for review before action.

Senator KENNEDY. You are going to do that?

Mr. ADAMS. Yes.

Senator KENNEDY. When will you have those?

Mr. ADAMS. That is not that July 1 promise date.

Senator KENNEDY. I hope also that you would indicate what procedures for review and approval of these types of activities would exist within the FBI and how you would deal with sui generis types of situations. We would be interested in that.

Mr. ADAMS. Each operation that we run, of a long-term duration, that is, an undercover operation, we require the field to send a memorandum to headquarters outlining the operation. This goes through our Legal Counsel Division en route to me, and when necessary, on up to the Director, and, in some cases, to the Attorney General for approval. We do keep close control on them. The people consult with our Office of Legal Counsel in advance, but as a final fail-safe, each operation is routed through the Legal Counsel Division for its comment and approval.

Senator KENNEDY. I think we probably ought to have a chance to see the ones that have been approved by the Attorney General over the last 1½ years.

Mr. ADAMS. That will be fine.

Senator KENNEDY. Let us say since 1976.

Mr. ADAMS. We might have somewhat of a problem if it is a current ongoing operation. But I think we will have, during that period of time, some that have been closed after criminal prosecution. They would, therefore, be available. We will be glad to submit that for you.

Senator KENNEDY. Thank you.

Without objection, so ordered.

[The following response was received by the subcommittee from the Department:]

A request for information concerning undercover operations approved by the Attorney General since 1976. In connection with the evolution of the application of the undercover technique, specifically in long-term undercover operations, it is important to note that the initial operations were Law Enforcement Assistance Administration (LEAA) joint local-Federal endeavors funded under the LEAA antifencing program. A condition of granting funding for joint projects is an LEAA requirement for a confidential memorandum of understanding setting forth the terms of the partnership between the local and Federal partners.

In each instance wherein the FBI participated as the Federal partner in LEAA joint funded operations, the confidential memorandum of understanding for these operations was submitted to the Attorney General for his approval. The position of the Department of Justice in regard to cooperative operations against organized theft and fencing is succinctly set forth in a letter from Assistant Attorney General Richard L. Thornburgh to the Director, FBI, dated January 14, 1976, which has been attached to this letter, q.v.

Since 1976, there have been 20 such LEAA funded joint local-Federal undercover operations wherein the procedure outlined above was followed. Most of these operations are still pending prosecutive action.

An example of such an operation wherein all prosecution has been completed is the LEAA funded long-term undercover operation code from TRICONN conducted jointly by the Metropolitan Police Department (MPD), Washington, D.C., and the Washington field office of the FBI. TRICONN was an outgrowth of two previous Sting operations and was targeted against fences, drug dealers, and dishonest businessmen. In this operation, a liquidation company was established as a front business for handling stolen property. This business, represented as a branch facility of a national organization, utilized a combined office/warehouse complex to project an impression that the business was capable of handling major items of stolen property. This business was staffed with undercover operatives from both the FBI and MPD who handled all contacts with the criminal element. Closed circuit television (CCTV) with audio backup was utilized to record all transactions in the business front. This operation ran from Oct. 12, 1976, to Sept. 8, 1977, and resulted in significant statistical accomplishments and widespread media coverage.

The confidential memodandum of understanding for each Sting operation, including TRICONN, was submitted to the Attorney General for approval, and Attorney General approval was obtained for the nontelephonic consensual monitoring of conversations with the criminal element in connection with the installation of the CCTV and the use of on-body recorders and transmitters by the undercover operatives.

It should be emphasized here that LEAA funded joint local-Federal undercover operations were conceptually similar based on an LEAA requirement that all grants under the antifencing program be targeted specifically against property crime. Also of significance is the fact that LEAA is an agency within the Department of Justice and as such had final approval authority for all LEAA grants under the antifencing program. Each grant application for an undercover operation detailed the operational plan and targets of the project as well as the projected budget and manpower requirements.

Since funding became available in the FBI appropriation for fiscal year 1977 for support of the undercover technique, there has been a shift from joint LEAA funded operations to solely Bureau funded long term operations targeted specifically at crime problems impacting upon FBI jurisdiction. Each proposal for a solely Bureau funded long term undercover operation is submitted to FBI Headquarters for approval. The approval process involves a complete review by the Legal Counsel Division at FBI headquarters, and in those instances where there is a unique legal problem, or unusual application of the undercover technique, the U.S. Department of Justice is consulted for a legal opinion. The majority of these operations have been conceived and implemented since 1976 and are presently in various stages of operation and/or adjudication in the courts.

An example of a solely Bureau funded operation is the long term undercover project code name GEMINI conducted by the New York City Office of the FBI. This operation began in August 1976, and ended in March 1978. All prosecutive action has since been completed.

This operation was established as a cartage business, utilizing a confidential source of the New York office and an undercover special agent, targeted against organized crime infiltration and control of the waste removal trade in the New York City area. It was anticipated that this business would be forced to pay kickbacks for the privilege of doing business in the New York City area. This business was actively involved in the daily routine of collecting garbage and soliciting new business from companies being serviced by suspect hoodlum-owned carting companies. In the course of this operation, the FBI undercover special agent was assaulted while performing his undercover role. Since nontelephonic consensual monitoring was absolutely essential for the safety of the undercover special agent and to collect evidence of criminal

violations, this proposal was submitted to the Attorney General for approval. This operation resulted in significant accomplishments, including the conviction of organized crime figures in New York City.

It is pertinent to note that all long term undercover operations, wherein any mode of nontelephonic consensual monitoring is anticipated, are submitted, in accordance with U.S. Department of Justice regulations, to the Attorney General for approval. Such a request details the modes of technical coverage to be utilized, the nature of the operation, the role of the undercover operative, and the targets or subjects of the investigation. Almost without exception. all long term undercover operations are predicated upon the employment of some mode of nontelephonic consensual monitoring in order to successfully implement and support the use of the undercover technique.

Further, any utilization of the undercover technique in long term operations is coordinated with and approved by the U.S. Attorney of concern in connection with obtaining his commitment to prosecute cases developed through the use of the undercover technique.

DEPARTMENT OF JUSTICE,
January 14, 1976.

To: Director, Federal Bureau of Investigation.
From: Richard L. Thornburgh, Assistant Attorney General, Criminal Division.
Re Cooperative operations against organized theft and fencing activities.

In a memorandum to you dated December 16, 1975, this Division expressed approval of a "Memorandum of Understanding" which outlined plans for a coordinated covert operation to attack Tidewater, Virginia, area organized theft and fencing activities. It is our understanding that the FBI has previously participated in similar projects in Illinois, New Jersey, and Washington, D.C. Your vigorous and innovative efforts to combat the serious threat posed by organized theft and fencing activities are most commendable. Since we in the Criminal Division are most interested in enhancing enforcement in these areas of criminal activity, we are anxious to assist you in these efforts in any way we can.

Cognizant personnel in the Law Enforcement Assistance Administration have informally notified us that they would like to see similar projects launched in other cities with similar theft and fencing problems. However, as you know, local law enforcement agencies must initiate the grant application for funding of projects such as the Norfolk operation. Accordingly, we would suggest that the FBI informally bring the availability of this particular type of LEAA funding to the attention of local authorities in these localities in which the Bureau feels such a cooperative effort would be both necessary and workable in terms of the degree of cooperation that could be expected.

This type of informal encouragement and liaison with local authorities concerning available LEAA funding is in no way contrary to the statutory and administrative limitations on LEAA operations.

We request and would appreciate your views regarding the establishment of additional projects in other geographical areas. We will be glad to assist in any way possible, such as assisting in liaison efforts with cognizant U.S. Attorney's offices or local prosecutors.

Senator KENNEDY. You will assemble those?

Mr. ADAMS. Yes.

Senator KENNEDY. I understand the use of undercover agents is a relatively new phenomenon. Is that right?

Mr. ADAMS. We have always used them, but in a different form. They used to be mostly "buy-bust." Certain agents were experts on art and where we knew that certain thieves were trying to dispose of priceless art, we would use them to make the "buy-bust" situation. It is only within the past few years that we have begun to engage in more long term systematic operations. That is where the new operation comes in.

Senator KENNEDY. I would like to know the reasons for that decision. I wonder why you made that decision now, which had not been a part of the Bureau's procedure in the past.

Mr. ADAMS. I think, for one thing, there is the financial situation. In the past when we had such limited funds in that area, at the time that you recovered the painting, if you did not recover the $50,000 that you had for "show" money in order to purchase the painting, that had a rather severe impact on the budgeted funds available for such purposes.

Last year, Congress approved $3 million in this regard.

Senator KENNEDY. What did you request from OMB; do you know?

Mr. ADAMS. I think originally we had requested $6 million. We got $3 million. We have had some discussion back and forth internally within the Bureau—not between the Bureau and the Department, but internally—and we feel basically that the $3 million has been a realistic figure. It does take an inordinate amount of manpower to support it. With the other demands on our manpower resources, we think that we are going to come in right where we should be on the $3 million. We do not feel that we have passed up any good opportunities in order to do this.

Senator KENNEDY. As for the FBI's access to records, to what extent has the FBI formal access to various types of third-party records? I am talking about employment records, credit records, medical records, phone records and tax records?

Mr. ADAMS. It varies considerably. With bank records, for instance, even in the face of the Supreme Court decision indicating there are no privacy problems, but that the records are the records of the bank and not the depositor, we utilize subpenas in almost every instance. I think a survey was conducted a month or so ago which showed that subpenas were almost invariably utilized. In certain private employment records, the public still cooperates willingly with the FBI in our investigative activity. We do enjoy a degree of access to such basic records of identity and aspects like that.

There are tight controls on credit bureau records. We can obtain fugitive information, for example, and place of employment and last employment and that type of data, but we cannot get a full report without a subpena.

Senator KENNEDY. You would say you have general access in all your divisions for those types of third-party records?

Mr. ADAMS. No; I say it varies. For instance, in bank records, there is the subpena route. In some other areas, it is access just on the basis of cooperation on the part of the private company.

Senator KENNEDY. Is it the position of the Bureau to try to get those records whenever they are available or whenever they have these informal or formal arrangements? From what I gather from your testimony, some of it is based on informal relationships that are worked out in different regions or in different agencies; is that right?

Mr. ADAMS. It gets back basically to the investigative function that most of our work is. Most of it is knocking on doors and asking people questions. That type of cooperation. Many people do not distinguish between answering our questions when we ask them or from showing us the records of their company concerning a matter that we might have under investigation.

When you get into the areas of banks and telephone toll records, that is a different situation. We have had records such as this which

have been the subject of congressional deliberation and concern. The general trend is toward requiring a subpena before making available third-party records. Our concern is that legislation is introduced almost every year which would apply, or propose to apply, warrant requirements to records. One bill was introduced a year or so ago that private investigators and everyone else in the world could get access to records as they always had, but the Federal Government agencies would have to have a warrant.

I have never been able to understand how we could conduct a major white-collar fraud case—such as the Arizona land fraud scandal that involved 20,000 victims and innumerable paper companies—if we had to go through some burdensome procedure where everytime we wanted to look at a document we would have to secure a warrant with an opportunity for someone to object and challenge. We might as well go out of business. Fortunately, these problems have been aired, and there has been no resolution which is adverse to the basic need for investigators to have this type of information, but it constantly comes up because of everyone's genuine concern over third-party records and access to matters which involve privacy. Yet, we have great responsibilities placed on us to conduct organized crime and white-collar crime and other complicated investigations. We do need weapons and the ability to ferret out information in this area.

So, during the charter process, we hope we will again come up with an accommodation which will satisfy both needs in this area.

Senator KENNEDY. Which areas, besides the bank records, do you utilize subpenas in?

Mr. ADAMS. Telephone toll records.

Senator KENNEDY. That is the only other area?

Mr. ADAMS. We do not have access, to my knowledge, to medical records. Generally, medical, school, or other records like that come up in applicant investigations. Then we obtain a waiver from the applicant permitting us to check those records.

Senator KENNEDY. During the course of investigations, what kind of cooperation do Federal agencies offer, and what type of information is made available to you?

Mr. ADAMS. We get full cooperation, as long as we have an investigative interest. The Internal Revenue Service is a different proposition. Taxpayer return information is a different proposition. The information that the tax revenue people develop during their intelligence investigations, which is unrelated to the taxpayer return, we make a request through the Department of Justice for that information. Of course, we enjoy excellent cooperation with the other Federal investigative agencies and where there is a need-to-know, and an investigative interest, such information is exchanged.

Senator KENNEDY. If an agent questions the legality of an order, what procedures are there within the FBI for an agent to follow?

Mr. ADAMS. It depends on what area this falls in. If it falls in the foreign counterintelligence area, not only can he question it through his supervisor, or write directly to the Director or the Attorney General, but he can take his concern directly to the Intelligence Oversight Board, or to the Intelligence Oversight Committee. We have had questions raised about our procedures. I have had in one particular case a national security wiretap where agents wanted to be assured

that that the Attorney General would give them a letter that would protect them from any future prosecution and also would guarantee indemnity against any civil suits which might arise out of it. I could take care of the prosecution issue without much difficulty because of the opinions of the Attorney General and the presidential authority, but when it comes to the point of immunity, until Congress acts on the amendments to the Federal Tort Claims Act, no one can assure an agent that he will have civil immunity for any act that takes place. So we do have things raised. We had a case in another office on preparing false identifications. The agent in charge of the office requested that we explore this particularly with the Attorney General as to whether it was legal. We obtained an opinion back in this case that it was legal.

I think everyone has the opportunity and is urged, in fact, to do this. We have sent out communications that if anyone has any questions about procedures that are improper, then they should raise those questions. They should report them.

Senator KENNEDY. For example, is it done on an ad hoc basis?

Mr. ADAMS. It is done on an ad hoc basis; yes. We have provisions in the manuals that we must report to the Intelligence Oversight Board. We have been reporting on a quarterly basis. Anything that comes up where we think there is a possible violation of law, or improper procedure, the manuals place the responsibility on each employee to bring such matters to the attention of our inspector general and our legal counsel.

Senator KENNEDY. For example, how many times has this come up, let us say, in the last year?

Mr. ADAMS. I would say, of my personal knowledge, maybe three or four specific instances where they wanted assurance that what they were doing was legal. I am sure that at the Investigative Division level, that there are questions raised every day on the phone to whether this falls within the guidelines or outside them. I would not have any figure.

Senator KENNEDY. Is there any notation in the agent's file that raises these types of questions?

Mr. ADAMS. There is generally. The ones I have had raised have been raised formally and by communication. So, the communication goes back explaining the answer.

Senator KENNEDY. If an agent raised these questions, whether it is done formally or informally, the fact that he raised it, is that in his files?

Mr. ADAMS. In his personnel file?

Senator KENNEDY. Yes.

Mr. ADAMS. Not that I know of. The communications that I have received have been over the signature of the special agent in charge, which would go into the case file of the particular matter as a record that a determination was made that the activity was legal.

Senator KENNEDY. I have some more questions, but I will submit them to you.

Senator KENNEDY. We will invite your responses to those questions.

Mr. ADAMS. We will be glad to respond.

[The following questions were submitted to Mr. Adams for his responses which follow:]

FEDERAL BUREAU OF INVESTIGATION,
Washington, D.C., June 13, 1978.

SENATE COMMITTEE ON THE JUDICIARY FBI CHARTER

The Senate Committee on the Judiciary was unable to cover some areas of interest to them during the Charter hearings held on April 25, 1978, and by letter dated April 28, 1978, from Senator Edward M. Kennedy to James B. Adams, Associate Director, FBI, 16 questions were submitted for FBI response. These questions, together with the FBI responses are set out below:

Q. What agencies, both Federal and state, are authorized by law to receive fingerprint identification information from the Bureau? What specific laws authorize this dissemination?

A. The basic authority for the FBI to operate the Identification Division is contained in Title 28, United States Code, section 534, which provides that the Attorney General shall acquire, collect, classify and preserve identification, criminal identification, crime and other records and exchange these records with, and for the official use of, authorized officials of the Federal Government, the states, cities and penal and other institutions. The Attorney General has delegated these functions to the Director of the FBI by Title 28, Code of Federal Regulations, Section 0.85(b). Under this authority FBI identification records are furnished to all Departments of the executive branch of the Federal Government and to members of Congress for official use. Courts, prosecutors, probation and parole officers, penal institutions, and law enforcement agencies are authorized to receive identification records for criminal justice purposes.

Pub. L. 92-544 (86 Stat. 1115) authorizes the FBI to exchange identification records with: 1. officials of Federally chartered or insured banking institutions to promote or maintain the security of those institutions; and 2. if authorized by state statute and approved by the Attorney General of the United States, to officials of state and local governments for purposes of employment and licensing. Under this authority records are furnished to state and local government agencies which require a fingerprint check for licensing or employment purposes. Examples are the submission of fingerprints in connection with the processing of applicants for gun permits, adoption of children, and admittance to the practice of law; and the licensing of private investigators, polygraph operators, and security guards.

Pub. L. 94-29 (89 Stat. 97) mandates that "every member of a national securities exchange, broker, dealer, registered transfer agent and registered clearing agency shall require that each of its partners, directors, officers and employees be fingerprinted and shall submit such fingerprints or cause the same to be submitted to the Attorney General of the United States for identification and appropriate processing." Under this authority FBI identification records are furnished to stock exchanges and the National Association of Securities Dealers which act as channeling agents for the organizations affected by this legislation.

Q. On page 43 of your testimony on April 25, you mentioned that a survey was conducted recently regarding the access various field offices have to third-party records. Would you provide the committee with a copy of this survey, the responses and any analysis or reports relating to this survey?

A. In January 1978, the Bureau's field offices were polled regarding their access to bank, credit, and telephone toll, employment, and health records. These offices were specifically asked if they could obtain access to these records without the issuance of grand jury subpena. Seven field offices indicated they had some limited form of informal access. Of these seven, three field offices had limited access to bank records and four had limited access to credit records. Where credit information is available, only descriptive and identifying data can be obtained without resort to process. Our field offices must rely upon the use of grand jury subpena generally for access to telephone toll, credit, bank, employment, and health records. It should be noted that waivers are obtained in order to obtain records pursuant to background investigations being conducted by the FBI.

The Bureau's inability to obtain third-party records in the absence of grand jury process is extremely critical in the area of foreign counterintelligence.

As a matter of practicality, foreign counterintelligence matters are not conducted within the grand jury system. For that reason, the grand jury process is not available for these investigations. Financial institutions and credit institutions are extremely reluctant to release records without process even where it can be demonstrated that the information is being requested for national security purpose. Our field offices have indicated overwhelmingly that they feel there is need for some legislative relief in order to obtain access to third party records where no grand jury process is available.

Q. Please identify those Federal statutes and regulations which restrict or control your access to third-party records.

A. The Family Educational Rights and Privacy Act of 1974. The Fair Credit Reporting Act. Tax Reform Act of 1976. Social Security Act and the Privacy Act.

Q. To what extent does the FBI have informal access to various types of State agency records or the records of other Federal agencies during the course of an investigation?

A. Although no in-depth survey has been conducted of our field offices concerning access to third-party records held by State agencies, the FBI does have access to Department of Motor Vehicle records and State and local law enforcement records.

Our access to records of other Federal agencies is strictly governed by the Privacy Act and is limited to "Routine Use," or "for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the records, specifying the particular portion desired and the law enforcement activity for which the record is sought."

Q. On page 48 of your testimony on April 25, you mentioned that the Bureau sent out "Communications" to field offices regarding the reporting of procedures which agents felt were improper. Would you provide the committee with a copy of these recommendations?

A. See attached FBI memorandum to all employees dated June 4, 1976, entitled "Intelligence Oversight Board," and airtel from Director, FBI, to Albany, dated November 29, 1976, captioned "Intelligence Oversight Board." Also attached is a memorandum to all Special Agents in Charge, dated February 27, 1975.

Q. Can you give us any specific examples of instances where domestic security investigations have actually prevented violence?

A. American League for Independent Voter Education (ALIVE) was a paramilitary organization whose objective was to prepare for armed intervention by guerrilla tactics to oppose Communism in the United States. Members participated in training involving firearms practice, political indoctrination, and construction of explosive devices in the Louisville, Kentucky, area. The group was strongly against court-ordered school busing, which would have involved integration of certain schools in the Louisville area. On August 17, 1977, based on information obtained as a result of an FBI domestic security investigation, Federal search warrants were executed, which resulted in the recovery of 97 hand grenades, 17,000 rounds of military small arms ammunition, and 26 sticks of dynamite. After recovery of the above material and subsequent investigation by the FBI concerning possible theft of Government property, members of the group became disenchanted and the organization folded.

The Weather Underground Organziation. The Weatherman was formed immediately before the June 1969, Students for a Democratic Society (SDS) National Convention. Like its parent organization, the Weatherman adopted the Marxist-Leninist ideology, but unlike the SDS which "talked" revolution, the Weatherman advocated active violence to bring it about in the United States. During the fall of 1969, Weatherman members were involved in violent demonstrations in Chicago and Washington, D.C. As a result of the demonstrations in Chicago, numerous members of the Weatherman were arrested by the Chicago Police Department on various local charges. Numerous Weatherman members failed to answer these charges and, as a result, Unlawful Flight to Avoid Prosecution (UFAP) charges were filed against them.

In late December 1969, Weatherman leaders urged the establishment of an underground movement using guerrilla tactics such as those of Arab terrorists. Since 1970, the Weatherman organization has claimed credit for numerous bombings which occurred in the United States.

In May 1977, this Bureau successfully penetrated the Weather Underground Organization (WUO) in Los Angeles, California. As a result of this penetration

by an undercover special agent, and subsequent investigation conducted by this Bureau, four WUO members and the leader of the Prairie Fire Organizing Committee (PFOC), were arrested on November 19, 1977, in Houston, Texas, and Los Angeles, California, in connection with their plan to bomb California State Senator John V. Briggs Office in Fullerton, California. Subsequent searches by Los Angeles Police Department (LAPD) based on local search warrants resulted in obtaining a volume of evidence. LAPD submitted evidence to FBI Laboratory and results of examinations indicate possible link between WUO and three unsolved Bureau bombing matters.

Federal prosecution of the individuals by the United States Attorney, Los Angeles, was subsequently dismissed subject to being reopened after the state prosecutions have been completed. Trial date set for June 26, 1978.

Q. Does the FBI have any formal written procedures for the use of mail covers, surveillance, undercover agents, trash covers, interviews and access to third-party or agency records? If so, may we have a copy of them?

A. There is at this time no compendium of "formal written procedures" controlling the use of undercover Agents. The authority to utilize undercover Agents resides with the special agent in charge, within each field division, in connection with short-term, individual case applications of the undercover technique. In those instances wherein undercover Agents are being assigned to long-term operations and-or are required to travel across field division boundaries in connection with undercover assignments, then such authority is based on FBIHQ approval. In the latter instances specific instruction and direction are afforded each operation to insure a justified and effective, efficient use of the undercover technique.

Virtually all applications of the undercover technique are closely coordinated with the U.S. Attorney holding prosecutorial power over the investigation being conducted. Additionally, it is clear that the usual restraints of the First, Fourth, Fifth, and Sixth Amendments to the Constitution as well as other statutory restrictions, executive orders, U.S. Department of Justice regulations, and internal FBI administrative and operational procedures apply to the use of undercover agents, always assuming that such utilization falls within our normal jurisdiction.

Policy on use of mail covers, criminal cases. The FBI does utilize mail covers in connection with its criminal investigations. It is our policy that mail covers may be instituted only after approval by FBI headquarters and this approval is limited to our important cases or cases in which it can be anticipated that positive results will be achieved by use of this technique. The mail cover, of course, does not involve an opening of mail. It is merely a recording of return addresses and-or postmarks appearing on the mail.

Requests for mail covers are initiated by our field offices, accompanied by full justification. The request is reviewed at FBI headquarters at various levels up to and including the Office of the Assistant to the Director—Deputy Associate Director (Investigation). In submitting its request, the field office involved advises FBI headquarters that the mail cover will be requested from the regional postal inspector in charge within 10 days of the date of its communication unless the field office is advised by FBI headquarters that the request has been disapproved. The communication from the field office must contain a brief background of the case, must state the need for the mail cover, the identity and complete mailing address of the person whose mail is to be covered, the identity of the regional postal inspector in charge, the statute and possible penalty involved, any information as to whether or not the person whose mail is to be covered is under indictment in connection with the matter under investigation and whether or not he is known to have retained an attorney to represent him.

Mail covers may be requested initially for a 30-day period and may be continued on request to the regional postal inspector in charge for two additional 30-day periods without seeking further approval from FBI headquarters.

Part 861 of the Postal Manual of the U.S. Postal Service sets forth regulations authorizing mail covers at the request of law enforcement agencies. The postal regulations state that mail covers may be requested in fugitive or criminal cases in order to obtain information to assist in locating a fugitive or to obtain evidence of the commission or attempted commission of a crime. For mail cover purposes, a crime is defined by the U.S. Postal Service as the commission or attempted commission of an act punishable by imprisonment for a term exceeding one year.

The vast majority of mail covers used by the FBI in the criminal field relate to fugitive cases. So far, during fiscal year 1978 we have approved mail covers in 28 criminal cases.

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Mail covers, domestic security. The Attorney General's domestic security guidelines as implemented by the FBI on April 5, 1976, provide for the use of the investigative technique of mail covers when a full investigation has been authorized by FBI Headquarters. Part 831 of the Postal Manual of the U.S. Postal Service sets forth regulations authorizing the Assistant Postmaster General, Inspection Service (Chief Postal Inspector), to administer mail covers at the request of enforcement agencies. In security cases, as delineated in "Manual of Investigative Operations and Guidelines," mail cover requests must include complete information concerning the name and address of each individual or organization to be covered and any additional information as attorney of record for subject and whether or not subject is under indictment. If a request for a mail cover is approved by FBI headquarters, arrangements for implementing the mail cover will be handled by FBI headquarters through the Assistant Postmaster General, Inspection Service.

The limitations on mail covers for domestic security cases are governed by the Attorney General's guidelines and, therefore, may not be used in either preliminary or limited domestic security investigations. Since a full domestic security investigation may only be authorized by FBI headquarters commensurate with the existence of certain facts which provide the basis of specific and articulable facts giving reason to believe that an individual or a group is or may be engaged in activities which involve the use of force or violence and which involve or will involve the violation of Federal law, the parameters are established for mail covers by the Attorney General's guidelines. The approval of the Attorney General or his designee is required in conjunction with adherence to postal regulations prior to utilization of this investigative technique.

Standards for criminal investigations, electronic surveillances. Electronic surveillances in the area of criminal investigation fall within two basic categories. They are those ordered by a U.S. District Court, under the provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Title 18, sections 2510–2520, U.S. Code) and those in which one of the persons participating in the conversation has given his consent to Special Agents of the FBI to overhear and sometimes record the conversation.

In addressing the electronic surveillances conducted as a result of an order of a U.S. District Judge, the standards are well defined.

The Attorney General has provided specific guidelines and instructions regarding policy in this area. These guidlines are set forth in Departmental booklets entitled "Agent's Manual for Conduct of Electronic Surveillance under Title III of Public Law 90–351" and the "Manual for Conduct of Electronic Surveillance under Title III of Public Law 90–351" prepared for the use of attorneys in the Department of Justice. These two booklets together provide step-by-step procedures in requesting, approving, ordering and conducting electronic surveillances.

Criminal violations that the Title III statute are allowed to combat are restricted to only a few of the most serious of crimes. In addition, this Bureau and the Department take the view that the use of a Title III should be considered in only those investigations with the most potential to impact on major criminal activity (and when it is demonstrated that other means will not result in successful prosecution) or in those instances wherein a life is in danger.

Once the investigators in the field decide to seek a Title III in an investigation, the proposed affidavit is prepared, working with the local office of the U.S. Attorney or Department of Justice Strike Force to ensure there is sufficient probable cause to support a request for a court order. The proposed affidavit is then forwarded to FBI headquarters for review. This includes the substantive superviser, the unit and section chiefs for substance, the Legal Counsel Division for the proper legal format as well as substance, and then by the Criminal Investigative Division Assistant Director before being reviewed by the appropriate Deputy Associate Director and final review and approval by the Director, These steps are considered necessary to ensure compliance within the scope and intent of the law. It is noted that this internal procedure in the FBI is an example of the highest standards being applied to the use of a Title III. As a result, since the enactment of Title III, only one Bureau application (out of the 1,050) has been refused by a Federal District Judge. (The one denial resulted from a 1969 gambling case in Las Vegas, where the judget questioned the probable cause. The request was dropped by the Department of Justice.)

In addressing electronic surveillances in which one of the participants has granted consent, it should be noted that they fall into two categories.

The first includes those instances involving only telephones. The Attorney General has issued instructions which allow the special agent in charge of a field office to authorize telephone electronic surveillances provided the local U.S. Attorney or Department of Justice Strike Force Attorney, upon being advised of the facts, concurs in the use of this investigative technique and states that it is his legal opinion no entrapment would result from the surveillance.

The second includes those instances in which one of the participants in the conversation grants his consent to overhearing or monitoring by means other than the telephone. In these instances the participant has concealed on his person or on his premises a transmitter or recorder. The Attorney General has reserved, to himself or his official designee, the authority to grant permission to use this investigative technique. In some instances of an emergency nature, the Attorney General has delegated to the Director of the FBI the authority to approve the use of this technique, but in each of these instances, this Bureau must follow that emergency authorization with an appropriate correspondence to the Attorney General or his official designee.

Normally when not of an emergency nature, the office seeking authority to consensually monitor a conversation other than by telephone must discuss the facts and circumstances with a representative of either the local U.S. Attorney or Department of Justice Strike Force Office and with his concurrence and specific comment that no entrapment would ensue. The facts, circumstances, and the opinion of that attorney are relayed to FBI headquarters for approval and submission to the Department of Justice.

Trash covers may be used as an investigative tool, but there are no formal written procedures for their use. There have been instances wherein individual criminal investigations, the legality of warrantless seizure of property has been brought to the attention of FBI headquarters. FBI agents may seize trash placed out for collection without a warrant and without infringing on constitutional rights of the party who put it there since this property has been abandoned and, hence, not protected by the Fourth Amendment.

Interviews are used as a basic investigative tool in investigation. There are no formal written procedures for interviews, but the general procedure regarding interviews is set forth in the Manual of Investigative Operations and Guidelines. The Attorney General Guidelines for Domestic Security Investigations provide for interviews during preliminary, limited and full investigations.

The FBI has no formal written procedures for the access to third party or agency records.

See answers to questions 2 and 3.

Q. One problem in codifying guidelines is that they could not be changed promptly enough to react to a demonstrated need. How often have existing guidelines been changed in the past?

A. Since the adoption of the Domestic Security Guidelines in April 1976, there have been no changes made to them.

Q. Would you explain what a mail cover is and how it is used? A. In what types of cases is this technique used? B. Are there formal guidelines defining the use of these covers? C. What procedures are followed when a mail cover is to be used?

A. Response to this question is addressed under question 7.

Q. Would you explain the UACB procedure?

A. UACB simply means Unless Advised to the Contrary by the Bureau. This procedure is used for other investigative matters and it is an administrative procedure whereby the investigating office having fulfilled the requirements for a particular investigative matter by previous communication advises that they will proceed with the prescribed course of action. This eliminates the need for a separate communication to the field office advising them to proceed with the investigative matter. It does not obviate approval at the necessary levels at FBI headquarters for the requested investigative technique. The Special Agent in Charge of the field office is aware in sending a communication requesting approval in an investigative matter with the requisite requirements fulfilled that the matter has been approved provided he does not hear to the contrary within a stipulated timeframe.

Q. Would you briefly explain how civil rights investigations are initiated by the FBI? A. Is each of these cases approved by either the Department of Justice or FBI headquarters before an investigation is begun by a field office? B. What criteria are used for approving these investigations? C. What percentage of the special agent workforce is assigned to this work?

A. All civil rights investigations (both criminal and civil) are initiated based either upon the receipt of a complaint, which is considered to be any allegation made, or information received from any source not known to be unreliable, which includes legitimate public press or other legitimate news media, indicating a possible violation exists, or upon the specific request of the U.S. Department of Justice.

A. All cases wherein investigation is initiated based upon the specific request of the Department are, of course, approved by the Department. The FBI field offices can initiate investigation in certain types of civil rights cases on their own initiative, based upon the specific guidelines and policy established by the Department. In other types of civil rights cases, based upon specific departmental guidelines and policy, the FBI field office obtains the initial facts of the complaint and forwards the results to the Department for its consideration as to whether any further investigation or Federal action is warranted. The results of all civil rights investigations conducted by FBI field offices are furnished to FBI headquarters where, after review, they are furnished to the Department for its consideration as to whether any additional investigation or Federal action is warranted.

B. All investigations in civil rights matters are based upon statutory authority, and in accordance with the guidelines and policy established by the U.S. Department of Justice.

C. Slightly over 2 percent of the Special Agent workforce is assigned to civil rights matters, based upon Time Utilization Recordkeeping.

Q. If the charter is written along the broad lines suggested by the Attorney General with the Department issuing guidelines, how can we be sure that the guidelines will be implemented and the procedures followed in each case?

A. Implementation of the guidelines and procedures therein would be controlled by the supervisor at FBI headquarters and further by the FBI headquarters inspection system. Primary responsibility for compliance would be with supervisory personnel in the various field offices and simultaneous review by supervisory personnel at FBI headquarters. Further compliance would be assured by appropriate reviews by the Department of Justice and reviews of procedures by congressional oversight committees. The guidelines compliance procedure as outlined above has been successfully utilized since April 1976, in the area of the Attorney General domestic security guidelines.

Q. I understand that there have been situations where the FBI has provided investigative or technical assistance to state police investigating a state crime, even though the FBI had no authority or jurisdiction in the case (e.g., Chowchilla kidnapping case). A. How often has the FBI been requested to provide such assistance and for what types of situations? B. Are there any guidelines for providing this assistance? Who approves this activity? What criteria is used? C. If the charter were to allow that assistance could be provided in extraordinary situations, what type of criteria should we consider, so that the FBI does not become a national police force and its resources are not abused by the states for every crime they cannot solve?

IDENTIFICATION DIVISION ASSISTANCE

A. The Latent Fingerprint Section of the FBI Identification Division is responsible for processing crime scene evidentiary material by chemical methods for the development of latent fingerprints, palm prints and footprints, and making comparisons of developed latent (or inked) finger, palm, toe and footprints with known prints of suspects or victims. The examination and identification of impressions obtained from fingers, hands, feet and or skin tissue from these body parts of unknown deceased individuals are also handled by the Latent Fingerprint Section. This service, in addition to being primarily utilized by FBI field offices, is offered to all duly constituted law enforcement agencies in the United States at the Federal, state, county, and local levels, including prosecutors and courts. Cases examined run the gamut of criminal offenses, local, state and Federal. They include heinous capital offenses, crimes of local and national notoriety, offenses involving public or national prominence, killing police officers, bombings, and offenses in which the subjects are notorious criminals or fugitives from justice. Many of the cases handled involve matters in which local or state law enforcement personnel are not qualified or lack the technical expertise to properly process the evidence, evaluate the developed impressions and make the necessary comparisons. Guidelines in regard to the provision of these services are that

all examinations for local, county and state law enforcement agencies are limited to criminal matters and are handled under the control and supervision of the Assistant Director of the FBI Identification Division. Articles of evidence voluntarily submitted for examination and comparison are processed in the Latent Fingerprint Section of the FBI Identification Division, which is located at FBI headquarters in Washington, D.C. Latent Fingerprint Section specialists, utilizing prepared illustrated exhibits, regularly testify in all types of judicial proceedings to latent print identifications. During the period October 1, 1976, through September 30, 1977, a total of 10,019 latent cases were handled by the Latent Fingerprint Section for local, county and state law enforcement agencies. In connection with these examinations, Latent Fingerprint Section specialists made 292 court appearances in behalf of local, county and state authorities.

Another area in which technical assistance of the Latent Fingerprint Section has been of invaluable investigative assistance to local, county and state law enforcement agencies is FBI disaster squad activity in identifying victims of disasters involving United States citizens. Specialists of the Latent Fingerprint Section comprise the technical nucleus of this squad, which, since 1940, has aided in the identification of the victims of one hundred and five major disasters in the United States and abroad, including air crashes, ship accidents, fires, hurricanes, floods, explosions and similar disasters. Requests for this assistance are honored from local, county and state law enforcement agencies. FBI disaster squad activity is limited to major disasters involving United States citizens accompanied by a request for assistance from local authorities. Participation in this activity is approved by the Assistant Director of the FBI Identification Division and by the Assistant to the Director–Deputy Associate Director of the FBI (Administration).

All services of the Latent Fingerprint Section of the FBI Identification Division are provided without charge.

The present controls, supervision and guidelines on the above-described technical assistance rendered by the Latent Fingerprint Section of the FBI Identification Division are considered to be adequate. These services and technical assistance have been provided to law enforcement over many years and in every instance the requested service is provided in response to a request from the local, county or state law enforcement agency. We do not believe that the furnishing of these services to state and local agencies would in any way result in the FBI becoming a national police force. There is no opportunity for abuse of the FBI's resources as each request received from a state or local agency is evaluated in regard to the need for the service and its impact on the Bureau.

CRIMINAL INVESTIGATIVE ASSISTANCE

With regard to the Chowchilla kidnaping case, it should be pointed out that the FBI entered this investigation under the presumptive clause of the Federal Kidnaping Statute. When evidence was established that the victims had not been taken interstate, the FBI, acting under specific instructions of Attorney General Edward Levi, was ordered out of the investigation; however, the FBI was instructed by the Attorney General to furnish complete cooperation to local authorities within legal boundaries. Since the kidnapers had utilized false identies in purchasing equipment used in the kidnaping from a Federal agency, a determination was made that they were possibly in violation of Title 18, section 1001, Fraud Against the Government. This enabled the FBI to continue its investigation.

For at least 25 years the bureau's policy has required field offices to obtain FBI Headquarters approval before conducting any investigation for a local law enforcement agency. FBI headquarters has limited cooperation short of active investigation in strictly local matters because of the lack of authority to conduct such investigations, the possibility of liability attaching to our activities and we have particularly avoided any interviews with possible suspects, witnesses or subjects. We have permitted FBI offices to attempt to obtain coverage or requested investigation through local police.

Although the FBI has no direct authority under Title 28, chapter 1, subpart B., Code of Federal Regulations which describes the FBI's general functions the Department of Justice has advised that there is no problem with the FBI utilizing its good offices between police departments to have local authorities conducted requested investigation, locate individuals in other cities for police department interview or the acquisition of records for the police.

Approximately 10 requests a week are received for assistance and many of these originate from small departments seeking out-of-state assistance in connection with a violent crime. These departments lack the experience and expertise of big city departments which are able to communicate directly between themselves for assistance. It is believed the Bureau could be of assistance to these departments, but the charter should limit our assistance to violent assault or murder cases and the coverage of out-of-state leads on request of the ranking official of a police department. This limitation of itself would preclude the FBI from becoming a national police force. Additionally, we would be limited in our assistance to the coverage of specifically requested out-of-state leads and would not involve ourselves in the overall investigation of a case.

As you undoubtedly are aware, the FBI renders assistance to local authorities under the Unlawful Flight Statute, and in cases involving police killings, if requested, by presidential executive order. Interstate criminal activity frequently provides statutory authority for cooperation in matters of concurrent jurisdiction. In suggesting statutory authority to the area of violent assault and murder, the Bureau is relying on experience of previous requests. The committee may desire additional comments from professional police organizations, such as the International Association of Chiefs of Police in considering this area.

TECHNICAL AND LABORATORY ASSISTANCE

A. Subject to the general supervision and direction of the Attorney General, Title 28, CFR section 0.85(g) gives the Director of the FBI authority to:

Operate the Federal Bureau of Investigation Laboratory, to serve not only the Federal Bureau of Investigation, but also to provide, without cost, technical and scientific assistance, including expert testimony in Federal or local courts, for all duly constituted law enforcement agencies, other organizational units of the Department of Justice, and other Federal agencies, which may desire to avail themselves of the service.

Technical assistance of this nature is provided on a regular and continuous basis.

Requests for electronic monitoring assistance is limited to the loan of FBI equipment to local law enforcement agencies. Neither installation nor operational assistance is provided by FBI personnel. Necessary instruction is furnished so that equipment may be properly and safely operated.

Requests from law enforcement agencies for technical equipment have been received approximately six to eight times per year.

B. Currently, the loan of electronic monitoring equipment must be approved by the Department of Justice on an individual basis.

It should be noted that the FBI does not currently require the local police to be involved in an "extraordinary" situation, but only that their investigative needs cannot be met without such equipment, and they must provide information which demonstrates that the case is of sufficient importance to warrant the use of FBI equipment. This determination of worthiness is made by the FBI, subject to Department of Justice approval.

C. An FBI Charter should retain technical assistance authority currently set out in Title 28, CFR section 0.85(g). Concerning the loan of electronic monitoring equipment, the current criteria, FBI method of operation, and Attorney General approval should be continued without change.

Q. Would you briefly explain what the legal attache program is and what function it performs? A. How many legal attaches does the Bureau have and where are they located? B. When did the program begin and what was its original purpose? C. Are there any formal agreements with the host countries which allow this operation? D. What is the statutory or regulatory basis for the existence of these foreign offices?

A. A. and B. See attached captioned "Legal Attaches" enclosed herewith relating to above.

C. There are no existing formal agreements with the host countries; however, prior to posting FBI personnel overseas, the concurrence of the U.S. Department of State, the appropriate U.S. Ambassador as well as that of the Foreign Ministry of the host government must be obtained.

D. See attached caption "Legal Attaches" enclosed herewith relating to above.

Q. What authority do the legal attaches have in the foreign countries? A. What type of investigative matters do they handle and for whom? In fiscal year 1977, the legal attaches handle 45,229 investigative matters. Can you give us a general

breakdown of what these were and the type of work the legal attaches would do? C. Are there any formal guidelines for procedures for the legal attaches to follow in performing their work? D. What type of work do the legal attaches not perform?

A. Legal Attaches have no legal jurisdiction nor do they have authority to conduct investigations in foreign countries; however, their presence there is with the concurrence of the host government and the U.S. Department of State and the appropriate U.S. Ambassador.

A. See attached captioned "Legal Attaches" enclosed herewith relating to above.

B. It should be noted that the above figure includes name check requests conducted for foreign law enforcement and security/intelligence agencies and such requests do not require investigation. However, exclusive of the name checks, the investigative matters handled consist primarily of the following major categories:

	Approximate (in percent)
Personal crimes	26
Foreign counterintelligence matters	19
Fugitives	17
White collar crimes	11
General property crimes	7
Organized crime	2

C. Guidelines or procedures for Legal Attaches are set forth in the FBI's Legal Attache Manual, Manual of Administrative Operations and Procedures, Manual of Investigative Operations and Guidelines, Foreign Counterintelligence Manual, and Legal Handbook for Special Agents. Only the Legal Attache Manual applies exclusively to the Legal Attache Offices; however, it is used in conjunction with the other manuals.

D. The FBI's foreign liaison program is of a service nature only. Legal Attaches have no jurisdiction by law outside the United States; they have no authority to conduct investigations in foreign countries and generally do not even conduct interviews abroad.

Q. What does the FBI mean when they say that the legal attaches are not "operational?" A. Is this true in all cases, including Mexico?

A. This information is classified and will be available for access by the Senate Committee on the Judiciary.

OFFICE OF THE DIRECTOR

UNITED STATES DEPARTMENT OF JUSTICE 1-76

FEDERAL BUREAU OF INVESTIGATION

WASHINGTON, D.C. 20535

June 4, 1976

MEMORANDUM TO ALL EMPLOYEES

(A) INTELLIGENCE OVERSIGHT BOARD -- The President by Executive Order 11905 of February 18, 1976, established the Intelligence Oversight Board. The Board, composed of three members appointed by the President from outside the Government, is charged with reviewing activities of the Intelligence Community that raise questions of legality or propriety. The activities to be reviewed by the Board are those conducted by the Intelligence Community as part of Government business. With respect to the FBI, activities to be reviewed by the Board are those conducted under Section 4 of Executive Order 11905 relating to foreign intelligence and counterintelligence. In this regard, the Board will receive and consider reports from Inspectors General and General Counsels of the Intelligence Community concerning activities that raise questions of legality or propriety. In the FBI the Inspector General is the Assistant Director, Inspection Division, and the General Counsel is the Assistant Director, Legal Counsel Division. It is important to emphasize that the Board is not to review illegal or improper personal activities of Government employees.

Pursuant to provisions of the Executive Order, each employee is instructed to cooperate fully with the Intelligence Oversight Board. Further, the Intelligence Oversight Board has advised that the Executive Order does not explicitly establish a system by which employees of the Intelligence Community would report to the Board. The Board was not established as a substitute for the FBI's normal procedures for receiving complaints and allegations from employees. Nonetheless, the President has made it clear that he expects the Board to accept information from individual employees which falls within the Board's jurisdiction. Although the Board does not feel an obligation to investigate all allegations received, it will, as it deems appropriate, follow up on serious allegations received from employees bearing on activities conducted by the Intelligence Community as part of Government business. Accordingly, although only a fraction of the Bureau's work relates to foreign intelligence and counterintelligence, you are advised that with respect to foreign intelligence and counterintelligence you do have the ability to report directly to the Board on matters coming within its purview.

* Superseded By E.O. 12036 (1-24-78)

Clarence M. Kelley
Director

Airtel

To: SAC, Albany 11/29/76

From: Director, FBI PERSONAL ATTENTION

INTELLIGENCE OVERSIGHT BOARD

Reference is made to Memorandum to All Employees dated 6/4/76, captioned as above, and Buairtel to all SACs dated 6/10/76 captioned "Attorney General Guidelines for FBI, Foreign Counterintelligence Investigations."

Referenced memorandum pointed out that by Executive Order 11905 dated 2/18/76 the President established the Intelligence Oversight Board (IOB). The IOB is comprised of three members outside of Government. IOB is charged with reviewing activities of the Intelligence Community that raise questions of legality or propriety. This memorandum also stated that IOB will receive and consider reports from Inspectors General and General Counsels of the Intelligence Community concerning activities that raise questions of legality or propriety. In this regard, the Assistant Director, Planning and Inspection Division, and Assistant Director, Legal Counsel Division, will fulfill this function in the FBI.

Under the dictates of Executive Order 11905, a copy of which is attached, the basic duties of the Planning and Inspection and Legal Counsel Divisions are as follows:

(1) Discover and report to IOB any activity that raises questions of legality or propriety within the FBI.

(2) Report to IOB any questionable activities of any U. S. foreign intelligence agency operating within the United States that comes to the Bureau's attention.

(3) Submit quarterly reports to IOB of any findings concerning questionable activities outlined in #1 and #2 above.

OFFICE OF THE DIRECTOR

PERSONAL ATTENTION
MEMORANDUM 10-75

UNITED STATES DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF INVESTIGATION

WASHINGTON, D.C. 20535

February 27, 1975

MEMORANDUM TO ALL SPECIAL AGENTS IN CHARGE:

(A) REPORTING IMPROPER OR UNAUTHORIZED REQUESTS, EXPLOITATION, OR MISUSE OF THE FBI --

The FBI, as the investigative arm of the Department of Justice, is a fact-gathering and fact-reporting agency whose operations must be characterized at all times by complete integrity and impartiality. Furthermore, all FBI personnel must be alert to any indication of possible exploitation or misuse of any of the Bureau's resources. Therefore, I want to reaffirm at this time our long-standing policy for employees to report to supervisory officials or to me any untoward requests, practices, or behavior. In line with standing instructions of the Attorney General, I will continue to immediately bring to his attention instances which in my judgment are improper or which, considering the context of a particular request, I feel present the appearance of impropriety.

All FBI personnel are hereby reminded and instructed to comply with the above-stated policy. Bring the contents of this memorandum to the attention of all personnel assigned to your division.

Clarence M. Kelley
Director

2-27-75
MEMORANDUM 10-75

Airtel to SAC, Albany
RE: INTELLIGENCE OVERSIGHT BOARD

(4) Submit immediate reports during intervals between quarterly reports to IOB regarding activities, including any major or significant activities, that raise serious questions of legality or propriety of ongoing or planned activities by the FBI.

(5) Insure that all FBI employees have been instructed to cooperate fully with the IOB.

(6) Be prepared to have IOB review periodically FBI guidelines used by the Office of Inspections designed to identify questionable activities in the intelligence field that raise questions of legality or propriety.

It can be readily seen that the duties and sanctions placed upon the Intelligence Community by Executive Order 11905 are absolute and a matter of strict compliance. Any employee of the FBI who does not comply with these instructions could subject himself to grave, and possibly legal, consequences and bring discredit to the FBI as an organization.

I am holding each SAC personally responsible to insure that employees in his division are fully aware of the Bureau's duties and responsibilities. SACs are instructed to devise administrative procedures that will bring to light questions of legality and propriety.

Hereafter, SACs will personally discuss this topic at the semiannual clerical and agent conferences and the Office of Inspections will address this matter at the time of field inspections. In addition, each office will submit a quarterly airtel marked to the attention of the Planning and Inspection Division to reach FBIHQ by the first of the month reporting on any question of legality or propriety of any ongoing or planned activities in the foreign intelligence field. The initial airtel should reach FBIHQ by 1/3/77 and it should cover the preceding three months. The results of these communications will form a basis of the Bureau's quarterly letter to IOB. However, any major or significant activity that raises serious questions of legality or propriety of ongoing or planned activities should be brought to the attention of the Bureau immediately and not held for the quarterly airtel.

LEGAL ATTACHES

OVERVIEW OF LEGAL ATTACHE PROGRAM

The Legal Attache Program had its inception in the 1940s. Prior to World War II, President Franklin D. Roosevelt charged the FBI with responsibility for countering the activities of Axis intelligence services in the Western Hemisphere. The Special Intelligence Service (SIS) was formed within the FBI and Special Agents were dispatched throughout Latin America in both overt and covert capacities. Those assigned to U. S. Embassies were given the title Legal Attache. As part of their mission, Special Agents assigned to SIS helped police departments throughout Latin America improve and strengthen their professional capabilities. After World War II with the creation of the Central Intelligence Agency (CIA), the SIS was terminated and all Legal Attache offices in Latin America were closed with the exception of Havana and Mexico City. Covert operations ceased. Havana is now closed, but Mexico City remains open.

The scale of the operation was drastically curtailed but the value of having liaison posts overseas had become apparent. At the request of the U. S. High Commission in Germany an office was established temporarily in Frankfurt to assist in processing war refugees headed for the United States after World War II. Other offices were established in London, Paris, Madrid, and Rome.

Throughout the years, the number of offices has fluctuated. As of 4/1/78, there were 13 Legal Attache offices manned by 31 Special Agents and 34 support and service personnel covering some 80 countries and territories. A list of these offices is attached.

The mission of the Legal Attaches is to establish close, personal liaison with all principal law enforcement and security/intelligence agencies throughout their territories overcoming the differences in languages, laws and customs in situations which are often sensitive and complex. This provides the means by which leads overseas in FBI cases can be covered efficiently and expeditiously. In reciprocity, the FBI will conduct inquiries within the U. S. on behalf of cooperative foreign services provided that the request falls within the standards applied by the FBI for the initiation of its own investigations. Attached are copies of the 1979 budgetary program summary submitted to the Department of Justice.

Legal Attaches handle the entire spectrum of FBI cases with the great bulk falling into the criminal and applicant case categories. Legal Attaches act in a liaison capacity and are not intended to be operational. Where unusual circumstances indicate that an interview should be conducted by a Legal Attache, the standing instructions are to invite the person to the U. S. Embassy for the interview, or, if this is not feasible, for the interview to be conducted in the presence of local authorities.

Approved For Release 2005/11/23 : CIA-RDP80S01268A000500020027-8

At present, the Legal Attaches enjoy excellent working relationships with the Embassies within which they are housed. In accordance with PL 93-475, which delegates to the Chief of the United States Diplomatic Mission within the country of accreditation, "full responsibility for the direction, coordination, and supervision of all United States Government offices and employees," Legal Attaches keep U. S. Ambassadors to countries in which they conduct liaison informed of the nature and scope of their activities. They have specific instructions to insure that the Ambassador is briefed on any situation which could impact on foreign policy considerations within his area of responsibility. In addition to regular oral briefings, several Legal Attaches provide periodic written summaries of investigative accomplishments and problems within their countries to individual Ambassadors at their request. As a member of the staff of the Embassy to which he is assigned, each Legal Attache must satisfy his Ambassador of the value of his activities. Several Ambassadors submit annual performance ratings on Legal Attaches to FBI Headquarters. Each Legal Attache is also subject to scrutiny by his Embassy as part of the ongoing studies of staffing patterns of Americans overseas which look for areas where reductions can be effected without harming productive activities. Many Legal Attaches are members of the Country Team in their Embassy at the invitation of the Ambassador. Their widespread contacts in the law

enforcement, immigration and security/intelligence agencies of the host country frequently prove useful to the Ambassador and other officers in confronting the day to day problems of the Embassy.

Legal Attaches have a private, secure teletype system linking them to FBI Headquarters. U. S. Ambassadors are not on routine distribution for such messages sent over this system, but by agreement between the Attorney General and the Secretary of State, are entitled upon request, access to all non-administrative messages. The agreement excepts from review material that would compromise sources and methods or material which would be protected by Privacy Act considerations.

The FBI foreign offices return substantial dividends on a modest investment. Their staffs are productively and efficiently occupied. Their skilled liaison with our counterparts in areas of the world where the domestic responsibilities of the FBI are effected by developments abroad plays a vital role in successfully carrying out our mission.

(a) INVESTIGATIONS PROGRAM (Legal Attaches)

This program undertakes to provide a constant and prompt exchange of information and assistance with foreign law enforcement and security agencies in order to accomplish the responsibilities of the FBI in the applicant, criminal, domestic security, foreign counterintelligence, and inter-

national terrorist fields. Another objective of this program is to provide liaison for the purpose of locating and returning fugitives who have fled abroad, to the United States of America.

(b) PROGRAM JUSTIFICATION

Prior to World War II, President Franklin D. Roosevelt directed the FBI to establish foreign offices in order to undertake responsibility for counterintelligence in the Western Hemisphere. This was the basis for the Legal Attache System. There is no statutory or regulatory basis for the existence of these foreign offices. In budget hearings, however, representatives of this Bureau have regularly testified over the years before Congress as to the operations of our foreign liaison posts and Congress has regularly appropriated funds for these activities.

Currently, the FBI has thirteen posts abroad, known as Legal Attache Offices. These offices cover more than 80 countries and insure the exchange of information and assistance between foreign law enforcement and security agencies and the FBI. Our representatives are not operational. Agents assigned to these foreign posts achieve their results by liaison contacts, resulting in a close, cooperative relationship and thereby overcoming the differences in language, laws, and customs in situations which are often sensitive and complex.

Prior to posting FBI personnel overseas, the concurrence of the United States Department of State, the appropriate United States Ambassador and the Foreign Ministry of the host

government must be obtained. The United States Department of State provides office space and other administrative support to the program.

The following performance measures have been or are expected to be achieved in furtherance of the major objectives of this program:

	FY 1977	FY 1978	FY 1979
FBI fugitives located	735	735	735
FBI fugitives returned to U.S.	122	122	122
Fugitives of interest to other agencies located	63	63	63
Automobiles and airplanes located	91	91	91
Value of items located abroad ($000)	4,972	4,972	4,972
Investigative matters handled	45,229	45,229	45,229

The Legal Attache Program enables the FBI, through liaison, to locate and/or effect the return to the United States of fugitives who have fled abroad, locate vehicles, aircrafts and other stolen articles and otherwise fulfill its mandated responsibilities in the applicant, criminal, domestic security, foreign counterintelligence and international terrorist field. The statistics relative thereto are set forth above.

20-211 O - 78 - 7

Funding in Fiscal Year 1979, at the current level, would allow the FBI to continue the return to the United States of American fugitives abroad, and continue the exchange of information with foreign agencies in furtherance of our domestic responsibilities.

Funding at less than the current level would severely curtail this relatively small, but critically important program. Delays will be experienced in the timely processing and handling of investigative requests, many of which involve sensitive, high-priority investigative matters. A reduction in this program would have adverse impacts on the other field investigative programs, of which this program is directly supportive. Thus, the basic mission of the FBI would be hampered.

(c) LONG-RANGE GOALS

To provide a constant and prompt exchange of information and assistance with foreign law enforcement and security agencies in order to accomplish the responsibilities of the FBI.

(d) SHORT-TERM OBJECTIVES

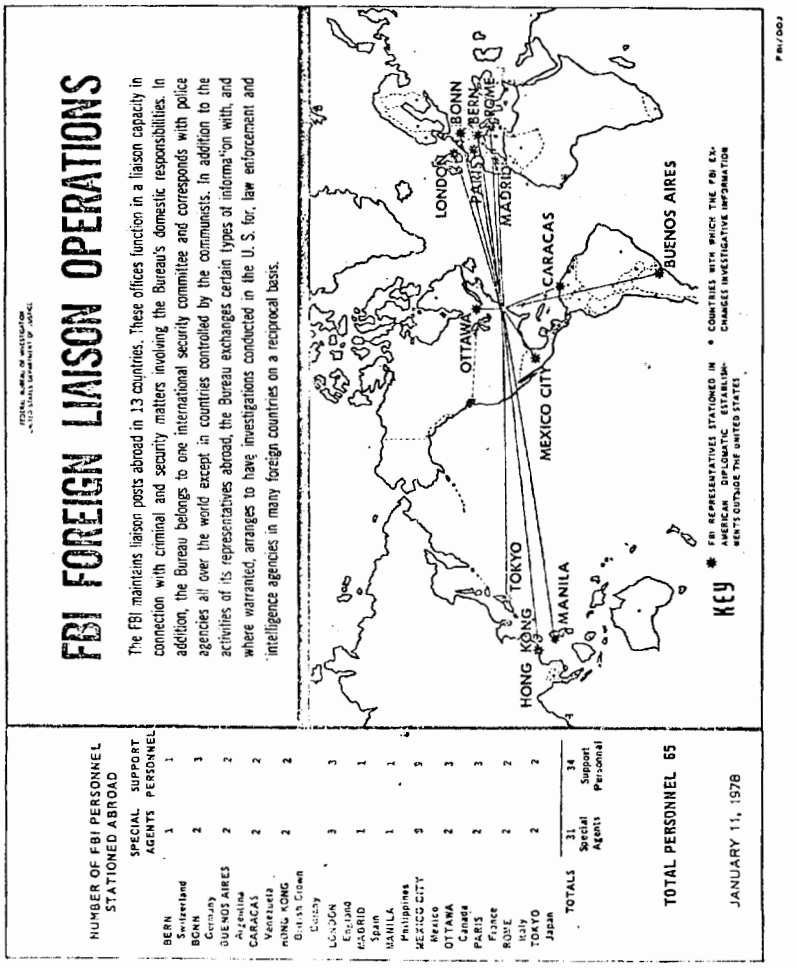
Major objectives are the location and return to the United States of American fugitives abroad, and the exchange of information with foreign agencies in furtherance of the domestic responsibilities of the FBI.

(e) ALTERNATIVES

Alternatives would be to (1) have other Embassy personnel abroad handle FBI responsibilities; (2) have FBI work handled by other United States Government agencies abroad, such as Drug Enforcement Administration (DEA), Immigration and Naturalization Service (INS), United States Customs Service, etc; (3) conduct all FBI business, having foreign ramifications by mail or other communication, directly with foreign governments; (4) handle all FBI work through INTEPOL. These possibilities are considered to be inadequate to the needs of the FBI because they either involve having FBI responsibilities accomplished by personnel with no experience in law enforcement, or by law enforcement personnel who do not have the training or experience with the broad scope of investigative responsibilities of the FBI, or would involve long delays in communication, with possible serious security risks involved.

(f) IMPACT OF SHORT-TERM OBJECTIVES

The Legal Attache program will be continued. The constant and prompt exchange of information and assistance will be maintained as much as possible with foreign law enforcement and security agencies.



Senator KENNEDY. Let me bring out one more question. This is on the Inspection Division. As I understand it, there are frequent inspections in the various field offices. Am I correct?

Mr. ADAMS. That is correct.

Senator KENNEDY. Are they really comprehensive?

Mr. ADAMS. Yes, they are.

Senator KENNEDY. Why did they not turn up the questionable practices of 1970, 1971, and 1972?

Mr. ADAMS. If I had privy to the results of the investigation, which we do not have, then perhaps I could answer that question. I do understand, however, that in connection with certain of the activities that Mr. Kearney was involved with back in the 1970–71 period, that there was material found which indicated that the inspector did consider that particular activity. I know this only from having it brought to my attention after it appeared in the newspaper. Apparently the documents were found that indicated this had been brought to the attention of an inspector.

Senator KENNEDY. Is that part of the *Gray* case?

Mr. ADAMS. No. This is the earlier case, the *Kearney* case. It was in response to the discovery motion filed in New York by the defense counsel. We started going through everything we could go through.

Senator KENNEDY. I will be submitting questions to you on that area.

I have here an FBI functional organization chart as well as the domestic security investigation guidelines and the civil disorder investigation guidelines which I will have placed in the record at the end of the hearing.

Senator KENNEDY. I want to thank you very much.

You understand it is going to be a continuing educational experience for those of us on this subcommittee. We will probably be going over these areas as we get more information. We look forward to working with the Department.

Mr. ADAMS. We are, too, because we feel that as we did when we started out 3 years ago when many things were being raised, we recognized the need for a charter. We felt it was the only safeguard that our personnel could have that they could be assured there is an accommodation.

Senator KENNEDY. Thank you very much, gentlemen. Our next witnesses are John Shattuck, Morton Halperin, and Jerry Berman, who are appearing on behalf of the American Civil Liberties Union.

John, we welcome you. Would you please start off?

STATEMENT OF JOHN H. F. SHATTUCK, DIRECTOR, AMERICAN CIVIL LIBERTIES UNION

Mr. SHATTUCK. We are happy for this opportunity to appear before you on a matter of great importance to the ACLU, to the Congress, and to the country. We would like to start by congratulating you, Mr. Chairman, at the outset, for your leadership in getting the Senate to approve an act to bring all Federal wiretaps of Americans under a criminal standard warrant procedure. As you know, we have long worked to improve this bill and are very pleased that under your leadership it was improved. This is a significant improvement over the

current law, and we think it is a hopeful sign for the future of the legislation that you are considering this morning.

Senator KENNEDY. Thank you. I will not ask Mort Halperin whether he would have voted for it or not.

[Laughter.]

We are glad to have your effective help and support in fashioning that standard. That is a very important contribution and very constructive. We appreciate your help.

Mr. SHATTUCK. We have also long urged the enactment of a legislative charter for the FBI. The ACLU, over the years, has challenged many investigative practices of the FBI which threaten and violate civil liberties, and the massive record of abuses which has been compiled in recent years, has, I think, shown that we were correct to make these challenges. On the other hand, the FBI has an important function to perform in investigating violations of the criminal laws of the United States. We think it is time for Congress to clearly define this function and to safeguard the rights of Americans by setting strict limits over the FBI's criminal investigaitve authority.

In our testimony this morning, we will set out what we believe the limits of this investigative authority regarding what they constitutionally should be as well as practically. The bulk of our statement this morning, Mr. Chairman, will be presented by Mr. Berman who has worked long and hard on this subject. He is legislative counsel for the ACLU as well as general counsel for the Center for National Security Studies. We have submitted a lengthy statement with many footnotes for the record, and we will, of course, not be covering all of that, but a great deal of the material in the statement will be summarized.

All three of us, including our colleague, Morton Halperin, are available for questions, and I will be adding something at the end of Mr. Berman's statement.

Senator KENNEDY. Without objection, the statement will be inserted into the record at the end of your oral testimony.

Mr. SHATTUCK. I think Mort Halperin would like to say a few words before Mr. Berman begins.

STATEMENT OF MORTON H. HALPERIN, AMERICAN CIVIL LIBERTIES UNION

Mr. HALPERIN. Mr. Chairman, let me reiterate what John Shattuck said about the wiretap bill and the great importance of the leadership that you provided on that. I also want to underscore my sense that the activity you are engaged in here is of extraordinary importance. I think that most of us assume, as I did, that when you came to criminal investigations, there were clear guidelines and rules. I think we have discovered that this field is as unregulated as national security investigations have been unregulated.

This issue really goes to the heart of the democratic society. How do you investigate crime without at the same time intruding on the right of free and secret, if necessary, political association? It is clear that there are complicated issues here, but I think it is also clear that Congress, in face of the record, has an obligation to legislate in this area. I am very encouraged that you have begun these hearings, and I would urge you to stick with it until we get the kind of legislation that I think will give us the balance that we need.

STATEMENT OF JERRY J. BERMAN, AMERICAN CIVIL LIBERTIES UNION

Mr. BERMAN. Mr. Chairman and members of the committee, we welcome the opportunity to testify here today on the urgent need to develop a statutory charter to govern the FBI and to state our views on critical issues which must be resolved. Concurring in your view that this is a matter of paramount legislative priority, we commend you for initiating these deliberations and look forward to working with this subcommittee and the Congress in a concerted effort to enact a statutory charter into law. This legislation is long overdue. For 2 years both the Congress and the previous and present administration have repeatedly said that an FBI charter is urgent, yet we are only now getting down to business. In this regard, we are particularly pleased that you prodded the Justice Department to come forward in July with some kind of proposal for an investigatory charter. We also share your view that this is the first priority and that the administration's recent call for a comprehensive FBI and even Federal law enforcement charter must not become a reason to delay further the resolution of basic issues.

I turn now to the need for an investigatory charter. The massive and disturbing public record of investigative abuse by the FBI is the primary impetus for charter legislation. While we can hope that these programmatic abuses are in the past, we must bear in mind that the central conclusion of each of the many congressional inquiries is not that investigative abuses were committed, but that they occurred largely because the FBI's investigative powers are undefined, unchecked, and unregulated by statutory standards and procedure. Current statutes simply authorize the FBI to detect . . . crimes against the United States. Nowhere in the United States Code does the Congress set out standards and procedures to guide the Bureau in detecting crime: the basis for initiating investigations; the standard that must be met to conduct intrusive investigations; or guidelines to control the use of investigative means. As for the Bureau's domestic security mission, the code is simply silent.

This congressional deference to the executive has been destructive of civil liberties and damaging to law enforcement. Violations of first and fourth amendment rights have resulted on a scale incompatible with a democratic society and may still be going on. Public trust in law enforcement as well as Bureau morale have been undermined. The demonstration by FBI agents while this hearing was going on last Thursday evidences that. Both the public and the agent in the field are looking to Congress to protect civil liberties and end the uncertainty about what agents can and cannot do without risking indictment or civil liability. Only the Congress can resolve these issues.

Today we will focus our testimony on the case for the five basic reforms which a statutory charter must institute:

These proposals are embodied in the model legislation, "A Law To Control" the FBI, which all of us here helped to draft, and in legislation, H.R. 6051, now before the House. Although they may be controversial, we hope that over the course of these hearings the committee and the Congress will become convinced their enactment is both wise public policy and necessary for the protection of fundamental constitutional liberties.

First, the charter must abolish the domestic intelligence jurisdiction of the FBI and limit the FBI to the conduct of criminal investigations.

Second, the charter must only authorize intrusive investigations pursuant to a criminal standard, excluding conspiracy as a basis for investigation when first amendment activities may be involved. The purpose of such investigations should be the gathering of evidence for arrest and prosecution.

Third, the charter must establish strict statutory procedures governing investigations which may intrude on lawful first amendment activity in order to ensure that they are properly authorized and conducted so as to minimize the intrusion.

Fourth, the charter must establish a judicial warrant procedure governing the FBI's direction of informants or undercover agents to infiltrate associations in authorized criminal investigations.

Fifth, the charter must prohibit the FBI from engaging in prevention action or Cointelpro-type activity. While our extended testimony covers each of these issues in even greater depth, we will devote most of our limited time today to stating in some greater detail why we believe domestic security investigations should be prohibited; why criminal investigations should not be premised on conspiracy statutes, and why warrant procedures are required to permit the use of informants and undercover agents in authorized criminal investigations.

Domestic security investigations are intelligence investigations undertaken by the FBI primarily to prevent acts of political violence rather than to effect criminal prosecution. Although the FBI never recognized such a distinction in the past, domestic security investigations are today defined as distinct from counterintelligence investigations because the violent acts they are intended to anticipate and prevent are not undertaken for or on behalf of a foreign power. Most of the intelligence investigations conducted by the FBI, form investigations of subversive activities to investigations of radicals and extremists fall in this category. We believe these are the core issues, and that we want to join the debate on these issues. We don't want to become entangled in guidelines over domestic security until we decide whether that is a mission worth authorizing the Bureau to conduct by statute.

I think that we ought to make it clear from the start what we mean by domestic security investigations. We consider these investigations undertaken primarily to prevent acts of political violence, rather than to effect criminal prosecution.

In the past, there has been no distinction made between domestic security investigations and counterintelligence investigations. Now, with the introduction of S. 2525 and S. 1566, the wiretap legislation, we begin to draw a line. But in the past most of the Bureau's investigations of subversives, radicals, extremists, civil rights groups, and so on, fall into this domestic category where there are no agents of a foreign power involved. Today, domestic security investigations are authorized to anticipate and prevent the violent overthrow of the Government, civil disorders, and domestic terroism.

The issue we address today is whether Congress should continue that jurisdiction. Because we think that it should not continue this intelligence function of the Bureau, we think the matter is properly before

the Judiciary Committees of the Congress, rather than the Senate Intelligence Committee.

The value of domestic intelligence does not outweigh the risk to civil liberties.

Senator KENNEDY. Let me just ask you about the sentence before, "Today domestic security investigations are authorized to anticipate and prevent the violent overthrow of the Government, civil disorders, and domestic terrorism." Is the standard now being used under the recent guidelines for criminal standards?

Mr. BERMAN. I believe it is a loose criminal standard. It is not tight enough for us, and I think that what the guidelines do is codify the conspiracy statutes, such as the Smith Act. While the purpose of the guidelines is to prevent activities which lead to the violent overthrow of the Government involved, or will involve force or violence, you will see that the standard for investigation is much lower than that. It is a maybe, or a reasonable suspicion of people involved in activities, rather than a strict criminal standard.

Senator KENNEDY. With the preliminary investigation, is that the basis for which will involve the use of force and violence, and which will involve the violation of Federal laws?

Mr. BERMAN. Yes. You see that is the standard for the investigatory purposes. That is a preamble. But, if you turn to the standard for full investigations, where we are particularly concerned, you will see that it is a future crime standard. Furthermore, as you know, in all the difficulties over the wiretap legislation, being engaged in crime is different from being involved in activities. It is a much more nebulous term.

I may be lawfully engaged in first amendment activity, but somehow involved in unlawful activity under the terms of the guidelines. In any event, I don't think it is the guidelines we are talking about, but the mission.

Over the course of our history, we have always recognized the tension between maintaining an open, democratic society and protecting the society from violent disruption. Repeatedly, we have established domestic security measures in response to perceived threats to our social order.

In every case, from the Alien and Sedition Acts through the Palmer raids in the twenties and the loyalty and security programs in the fifties——

Senator KENNEDY. We changed the "may be" to be "futherance of."

Mr. BERMAN. We did that in the wiretap legislation where we were using a wiretap technique. That was in counterintelligence and we were talking about the use of an intrusive technique of wiretapping whereas the guidelines are talking about when do we start looking at records and conducting physical surveillance, and infiltrating organizations, and the like.

Senator KENNEDY. Would you distinguish this standard here from the one you proposed, and would you do it now or later?

Mr. BERMAN. I will come to it later. We would like to do it in the context of the criminal investigation rather than a domestic security jurisdiction in the Bureau.

Senator KENNEDY. Fine.

Mr. BERMAN. The long and the short of it is that up to the recent revelations of massive covert FBI surveillance and disruption of lawful political activity over the last four decades, the measures employed have proved far more damaging to our society than protective of it. Yet today we are considering the continuation of a domestic intelligence jurisdiction for the FBI. The new threat to which we are responding is political terrorism. Persistently we rely on these demonstrably dangerous measures because of our stubborn adherence to the two basic assumptions: One, that it is possible to draw the fine line between legitimate conduct and illegitimate investigation of advocacy and association and thereby minimize the threat to civil liberties; and two, that domestic security operations can substantially prevent or reduce political violence. These assumptions permit the assertion that on balance the benefits outweigh the risks. The only problem then is to design proper guidelines and effective oversight.

These assumptions are thoroughly debunked by the evidence for three reasons: First, by definition, domestic intelligence investigations require surveillance of lawful political activity. Particularly in times of social turmoil, those charged with a preventive intelligence mission have been unwilling or unable to distinguish between vigorous citizen dissent and real security threats.

Second, in part because of this misdirection, domestic intelligence operations have failed totally to accomplish their goal of preventing violence.

Senator KENNEDY. That is an important issue that we have to try to evaluate, that is, what their representations are. We heard some examples today. We have asked for the greater detailing of that, but I supposed that it is, at least, a consideration. You are balancing this type of intrusion into first amendment rights without any effective prevention of violence. Then there is the question as to whether or not you have found that there has been a prevention of violence over the period of time.

Your representation here is that they have failed totally to accomplish their goal of preventing violence.

Mr. BERMAN. Yes. In many respects we think these have proved counterproductive in the sense of inciting violence in some points, and making it more difficult for law enforcement at the same time threatening civil liberties. I think that if we could admit my first point, which is that by definition if you were trying to ferret out crimes, political crimes before they occur, then you cannot use a tight criminal standard. You are forced, almost by necessity, to start loosening those guidelines up and making more vague criteria in order to be able to allow an agency of the government to be there ahead of time. So we begin to slip the standards. I think we get to the second point of what happens if we recognize that risk, and then we have to look at the public record as to what has happened under lower standards of investigation for intelligence investigations.

Third, there is significant evidence that these efforts are counterproductive in stemming political violence and often have the opposite effect. Given these facts of life, sound public policy, based on the need to protect fundamental constitutional rights as well as society from serious violence, must reject this fruitless and dangerous course. Reaching this conclusion in no way implies that we do not consider

terrorism to be a serious potential threat to the fabric of our society and to our democratic institutions. Rather it is based on a large body of empirical evidence on the public record which, contrary to traditional dogma, indicates that preventive intelligence, to the extent that it is conducted within "tolerable boundaries," is useless for preventing terrorism and that "less intrusive means" may well be more effective.

First, drawing the line is impossible. If their objective is to permit the FBI to prevent a crime before it occurs, intelligence investigations, by definition, must be initiated without reasonable suspicion that a criminal act has been, is being, or is about to be committed. FBI agents will inevitably focus investigative attention on persons who vigorously dissent against Government policy or social conditions, or groups who advocate the need for radical, or revolutionary change, even though these activities are constitutionally protected. Dissenters are visible and reasonable targets of intelligence investigations which are supposed to prevent politically motivated violence. Moreover, if the investigative purpose is to piece together a "web of intelligence" which intelligence agents claim to require to distinguish the real threats of potential violence from "legitimate conduct," investigators have to gather information about all of the plans, activities, beliefs, associations, and memberships of suspect individuals and groups.

This danger is particularly acute when the principal investigative technique is the planted informer who cannot be entrusted with the decision to decide what is relevant or significant activity which may signal possible violence. The inevitable result is the very evil which the guidelines and charters are intended to prevent: Ongoing investigations of lawful political activity in violation of free speech and associational privacy protected by the first amendment and unreasonable searches and seizures in violation of the fourth amendment. While some may argue that you have to strain to read such authority into the Justice Department guidelines or the Church committee recommendations, two possible foundations for a domestic security charter, we must remember that tumultuous times produce such strained interpretations.

Second, preventive intelligence is ineffective and counterproductive. The inevitable costs of these intelligence activities require the Congress to carefully assess their value before authorizing them. Based on the public record, the Bureau's "offer of proof" to support its mission, and the General Accounting Office's intensive audit of FBI Domestic Intelligence, and its followup study appropriately titled "FBI Domestic Intelligence Operations: An Uncertain Future," there is literally no evidence to support the value of domestic intelligence in anticipating or preventing acts of political violence.

According to the Church committee,

> Between 1960 and 1974, the FBI conducted over 500,000 separate investigations of persons and groups under the "subversive" category, predicated on the possibility that they might be likely to overthrow the Government of the United States. Yet not a single individual or group has been prosecuted since 1957 under laws which prohibit planning or advocating action to overthrow the government.

According to the GAO audit of 17,528 FBI domestic intelligence investigations of individuals in 1974, only 1.3 percent resulted in prosecution and conviction, and in only "about 2 percent" of the cases was advance knowledge of any activity—legal or illegal—obtained. In our

extended testimony we cite other examples, and the GAO talks about organizational investigations turning up the same absence of anticipation of activity. The Senate Intelligence Committee offered the Bureau the opportunity to send a memorandum to the committee asking what the examples were and why they should authorize this. They came up with three out of the massive number of investigations they were conducting. I think the point here is that the Bureau's failure to anticipate or prevent violence occurred during the period when it operated covertly "with no holds barred," as the late William Sullivan of the Bureau used to say.

None of the major outbreaks of political violence which are cited to support the need for a preventive intelligence jurisdiction were anticipated or prevented: the civil disorders of the sixties the campus disorders of the seventies, the Capitol bombing, the political assassinations and attempts, the violent activities of the Weather Underground or the SLA. So long as prevention remains the goal of domestic security investigations, new restrictions and procedures will further ensure failure. The often-heard criticism that these restrictions, necessary to protect civil liberties, will "tie the hands" of the FBI's intelligence agents is not unfounded. The followup report of the General Accounting Office report realistically describes the dilemma:

> Despite the improvements in the direction and control of domestic intelligence, there are still few visable results . . . . Realistically this may be the best that can be expected, particularly in view of the greater investigative restrictions now placed on the FBI and [in view of] its past record when there were fewer restrictions and less control.

Not only does domestic intelligence fail in its mission, with or without restrictions, but it is, we believe, in fact, counterproductive. Instead of serving to detect and prevent violence, domestic intelligence has the opposite effect of making crime detection more difficult and violence more likely while jeopardizing civil liberties.

By focusing on the dissenters and protesters in order to prevent violence before it occurs, intelligence agencies play into the hands of terrorists. As the aim of the terrorists is to both intimidate and create sympathy for his or her cause by convincing people that repression makes violence necessary, overreaction by authority is a key element in the strategy. If police investigate innocent persons or those sympathetic to the cause of the terrorist, the police confirm or appear to confirm the truth about repression. By violating constitutional rights, intelligence agencies unwittingly help to promote the success of terrorist tactics. By engaging in overbroad surveillance, intelligence agencies create paranoia and distrust of the police which makes detection of terrorists more difficult. To cite just two examples, the major reason why the FBI has had great difficulty in overtaking the SLA and Weather Underground is that a significant segment of the public has been unwilling to establish their whereabouts to the police and some people have helped these groups stay underground.

Intelligence investigations have made them enemies of the police, and they wrongly but understandably identify with other enemies of the police. Without public trust in police authority, which is undermind by surveillance or fear of surveillance, FBI criminal investigators are hindered in legitimate efforts to enforce the law.

Finally, by taking preventive actions or using illegal means, an intelligence agency can become the mirror image of the terrorist groups it is

supposed to thwart. When a police agency becomes a kind of terrorist organization using intimidation and violence to achieve public ends, even if their intentions are benevolent, that is a far worse threat than Black September or FALN, or SLA. Official terror is the ultimate evil of modern times, and the FBI, as the public record shows, used tactics in its intelligence mission which we associate with police states: from the compilation of emergency detention lists to Cointelpro. We are not here to flog the Bureau any longer, but we are saying that it is the mission. It is the particular segregation of the mission, in times of social turmoil which lead to the excesses. We don't think that guidelines can control that kind of mission.

We think a total change in emphasis is required. Instead of focusing on political dissent, the FBI should zero in on illegal conduct. The appropriate alternative is criminal investigations conducted under strict standards and procedures. Both the administration and key elements of the Congress are apparently coming to the same conclusion. As the Attorney General has stated in recent testimony before the House Judiciary Committee:

> Last year we began efforts to draft legislation dealing with the domestic security investigations of the FBI. It quickly became apparent, however, that it is unsound, both legally and practically, to isolate this particular subject from other areas of FBI criminal investigative responsibility. There is no real difference between investigations of criminal enterprises bent on violence for political motives and criminal enterprises bent on violence to extend the influence of organized crime for economic gain. Murder, assault, bombing and extortion are weapons equally adapted to calling attention to a political cause or enforcing a loan-sharking or kickback agreement. Whatever the motivation, the same investigative techniques come into play in attempting to identify the persons or organizations behind these acts, determining who provides the leadership and bringing a halt to such crimes. The only distinction is that greater safeguards for the protection of First Amendment rights should be provided in the investigation of crimes undertaken for political reasons.

Instead of wasting time and resources and infringing rights by trying to prevent violence before it occurs, the FBI should be primarily trying to prevent violence by detecting and prosecuting those who commit crimes of violence in order to deter such acts.

Senator KENNEDY. Should the FBI attempt to prevent any crime or wait until it occurs?

Mr. BERMAN. I think it has a preventive role within the criminal investigation, but it is far more limited in focus on crimes about to occur, specific acts about to occur. I think that that would take care of some of the cases where you could arrest or diffuse a bomb, like in the *Weatherman Underground* case. It is not a preventive intelligence investigation, but it is a criminal investigation to find the Weatherman Underground in which you have taken preventive measures. This is pursuant to a criminal investigation, and you are not out here looking for potential terrorists. So there are preventive measures, but we are now talking about preventive action. I think that within traditional law enforcement there are preventive measures which the police can take which don't involve Cointelpro activities.

I just want to make one point here. That is that all this morning we were talking about how the FBI is claiming that the guidelines have reduced the number of investigations. It should be remembered that the FBI is not operating under the guidelines. They are operating under far more restrictive internal rules that they call quality over

quantity which makes them focus on committed acts of violence and groups engaged in committed acts of violence. That is why the numbers have come down. The guidelines are flexible enough to permit wider investigation. The second reason why they are more focused is that they say the times have changed. We are not in a time of social crisis.

If the Bureau can focus on quality over quantity, then the statute can also. If this argument is thrashed out with evidence and offers of proof by the Justice Department, and we come to the conclusion that we should close down domestic security investigations, we would recommend three things:

First of all, Congress should enact a charter which would preempt all executive orders and limit the FBI to the conduct of criminal investigation. The charter must also carefully define the FBI's investigative responsibility in the areas of civil disorders and background investigations. These functions must no longer constitute a basis for intelligence investigations.

Then we come to a standard for FBI criminal investigations. The Congress must define carefully the FBI's criminal investigatory authority. The charter should mandate that the primary purpose of a criminal law enforcement investigation is to detect . . . crimes against the United States, by identifying the perpetrators and gathering evidence to establish the basis for arrest and prosecution.

Of particular importance, the Congress must establish an investigatory standard which the FBI must meet before it can conduct a covert, intrusive criminal investigation. We believe the FBI may not conduct such investigations unless it has a reasonable suspicion, based on specific and articulable facts and rational inferences from such facts, that the subject of an investigation, whether a person or a group, has committed, is committing, or is about to commit a specific act which violates a Federal criminal statute.

Senator KENNEDY. Now is that in the *Terry* v. *Ohio* case?

Mr. BERMAN. We read that as required by *Terry*. *Terry* never really addressed the full investigation. It was a stop-and-frisk case, but our argument is that this is the implication of *Terry* for a full investigation.

Senator KENNEDY. What do you mean, "about to commit?"

Mr. BERMAN. "About to commit" means to have taken a step toward the commission of a crime which would be different from an overt act in conspiracy law.

Senator KENNEDY. In the criminal code, we have some "substantial step."

Mr. BERMAN. But it must be a substantial step toward the commission of a substantive crime and not a substantial step toward the commission of a conspiracy. That's the problem, because conspiracy statutes, on their face, raise serious problems for prosecution but as an investigative standard, we think they are wholly inadequate and dangerous. It is too easy to meet a probable cause standard because you can use legal overt acts.

Senator KENNEDY. If they are about to commit it, though, even under that, isn't it effectively a conspiracy?

Mr. BERMAN. If you said "about to commit a specific act" it is not a conspiracy, but a conspiracy would be included in the term "about

to commit a violation of Federal laws." A specific act, if it is not clear in our statutory—the way we have framed it, I am sure we could make it clear by report language that we are excluding conspiracy as a basis for investigation.

Mr. SHATTUCK. Senator Kennedy, the critical point here is one that, in fact, you are bringing out by your questions. This is that, in fact, the "attempt law" is the appropriate way to look at the "about to" formulation, not conspiracy law, nor solicitation, nor anything that would touch upon speech. An attempt to commit a substantive crime would be the "about to" formulation that we are talking about. I think, as you move through the statement, you will see that conspiracy-based investigations are what we are most concerned about avoidings.

Senator KENNEDY. What I am interested in here is the distinction of your own framing of the standard versus the standard that the Attorney General endorsed.

Mr. BERMAN. Yes, we are spelling it out by saying that he has a conspiracy framework, and that is where we have joined issues.

Mr. HALPERIN. Maybe I will further confuse it, but it seems to me that the Justice Department is moving toward "probable cause," but of all crimes, including conspiracy. What we are saying is that we prefer the "reasonable suspicion" standard which is lower, but excluding conspiracy crimes as the basis to begin these investigations. I think that is the basis of the difference.

Senator KENNEDY. Thank you.

Mr. BERMAN. We point that out in the past, outside of executive orders, the Bureau has always read their overbroad jurisdiction to investigate from conspiracy statues. We think that by leaving conspiracy as the basis here, we have not solved the problem, but have come right around full circle to where we are today.

We do not propose a "probable cause" standard, which both the Attorney General and the FBI Director have indicated might be workable, because we are attempting to articulate a standard of investigation that is not premised on "conspiracy" statutes. In our view, reasonable suspicion of a specific act in violation of law is a tighter investigatory standard than probable cause of conspiracy, and the only standard that can protect constitutional rights adequately.

In the past, the FBI has conducted massive investigations of lawful political activity premises on the violation of conspiracy statutes such as the Smith Act, 18 U.S.C. 2385, and Voorhis Act, 18 U.S.C. 2386, which on their face punish lawful speech and advocacy. We recommend the repeal of these statutes by this charter legislation. However, even if they are repealed, the use of general conspiracy statutes, 18 U.S.C. 371, in conjunction with statutes prohibiting substantive conduct as a predicate for intrusive investigation perpetuates the problem.

Applying the courts' observations concerning the prosecution of political conspiracies to the investigation of such conspiracies illustrates the danger of such an investigative standard. Reading conspiracy statutes literally, advocacy of illegal acts by persons in association justifies investigation. Moreover, commission of wholly legal overt acts, inextricably intertwined with the political process, could also justify investigation. A standard of probable cause of such activity is easily met. Even if there is no specific intent to violate the law by one

or all of the associates, conspiracy statutes permit intrusive investigation of first amendment activity. Investigatory discretion to proceed under these statutes renders a "criminal standard" an illusory protection against future investigative abuses.

We are really looking in one other point. We are looking at the investigative standard, and first amendment activities for something like the specific intent that the courts require in a prosecution of the first amendment group. I know that we are going to have to thrash this out, but we do not think that standard ties the Bureau. Of cases involving terrorism and violence 99 percent are ones which have occurred, or committed. The Bureau has enough trouble just apprehending people who have committed terrorism and holding those investigations within bounds rather than trying to decide where a bomber might be, of whose threat is credible, and which organization's illegal purposes are going to lead to violence. The prosecutorial requirement of specific intent must be paralleled in the standard for investigation. Persons or groups should not be targeted for investigation unless there is reasonable suspicion that the substantive crime, rather than conspiracy, is about to be committed. For example, if the FBI obtains evidence of a specific threat of illegal activity by an association together with specific and articulable facts indicating that a member has purchased weapons, the FBI would have reasonable suspicion that a criminal act was about to be committed.

The FBI would not be required to sit on its hands until a substantive crime occurred. The criminal standard allows a full investigation before the law has been violated. More important, it should not bar the Bureau from conducting preliminary inquiries using less intrusive techniques. A charter, providing for a preliminary criminal inquiry, would allow the FBI to check its own records, conduct interviews, contact established sources of information, and use other such means to find out whether the basis for a full investigation exists. Without meeting a reasonable suspicion standard, the FBI could check out specific threats, credible allegations, incidents, and the like. On the other hand, if the allegation is unfounded, or in the case of a full investigation, if the substantive crime does not occur, the investigation must terminate.

Rather than hinder the Bureau, the standard would make the FBI more effective in carrying out its law enforcement responsibilities. Conspiracy predicated investigations lead to overbroad investigations which are a waste of resources on virtually fruitless attempts to prevent political violence. The narrow standard we propose is required when first amendment activities may be investigated. The same standard is probably not constitutionally required in organized crime and other criminal investigations. However, fourth amendment considerations remain; a criminal standard is therefore required.

We look to the Justice Department and the FBI to explain why a uniform standard would not be wise or practicable. At this point I think John Shattuck would like to go into the next issue.

Mr. SHATTUCK. Senator, I think the next proposal is actually less controversial than anything else in our statement because we find substantial support from the Attorney General for special procedures to safeguard and minimize the intrusion on first amendment and other

constitutional rights in the conduct of the kinds of criminal investigations that Mr. Berman has just been laying out for you, so our point is this: We are pleased that the Attorney General agrees with us and has on several occasions stated that he also believes that special procedures for accountability are essential in this area. They would include accountability for the authorization and conduct of an investigation, assuming that no investigation is initiated without statutory basis; that criminal investigations do not become a pretext for open-ended intelligence investigations; that the least intrusive technique necessary to obtain evidence be employed; that investigations are not overbroad; and that privacy is not violated by unnecessary maintenance and dissemination of information.

Senator KENNEDY. Before we continue on this, in the middle of page 11 you point out, "the narrow standard we propose is required when first amendment activities may be investigated. The same standard is probably not constitutionally required in organized crime and other criminal investigations." I imagine you are talking about white-collar crimes and others like that.

Mr. BERMAN. Yes; we find that it is the first and fourth amendment activities that raise the standard, but we have looked at some evidence of organized crime investigations which raise a policy question about the standard. Most of those have been conducted under committed crime standards. Moreover, when the GAO did a study of organized crime investigations of strike forces, as you are well aware, for the 10 years that has been $80 million wasted because of lack of definition as to what organized crime is. So, part of the focusing in a standard would also maybe focus their organized crime investigations.

Mr. SHATTUCK. The special procedures to which I was referring are somewhat of a departure from the way in which investigations are now conducted. I think the spirit of these procedures is currently followed, but I think some clear statutory guidance is necessary. Special provisions to achieve these ends are laid out in "A Law To Control the FBI." They include: (1) requirements for written authorization and certifications; (2) time limits for investigations; (3) Justice Department review, authorization, and supervision of continuing investigations; (4) special authorization and Justice Department mandated procedures to govern the use of intrusive techniques; and (5) requirements that minimization procedures be established. These provisions are not detailed regulations, which the Justice Department and the Bureau seem to fear. Rather they simply mandate that the Justice Department establish procedures according to statutory criteria. They set appropriate limits on administrative discretion.

All of these procedures should apply in criminal cases involving first amendment activity. But many also protect against fourth amendment privacy violations and should apply to all criminal investigations.

These are matters that I think there is a larger consensus on than almost anything else in the legislation that you will be considering. We do want to emphasize that procedures cannot be merely internal. They should not simply be the kind of secret guidelines which we have had but rather something set forth in statutory form that we can look at and know about, comment on, and make sure that the kinds of intrusions on constitutional rights that have gone on because the procedures have not been in effect in the past don't go on in the future.

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The point that we want to conclude our prepared presentation with is one which you brought out in some detail in your questioning of Mr. Adams, namely, the whole question of the warrant procedure and accountability mechanisms for the use of informers and undercover agents. We feel that this is one of the most critical areas in which the charter should move. We start from the premise that the wiretap as technique of search, is very similar to the undercover agent. In fact, if anything, the undercover agent is considerably more intrusive and, in many respects, much more dangerous. If there is going to be a fourth amendment and statutory warrant procedure across the board for the conduct of wiretaps even in very sensitive foreign intelligence areas, such as you have in S. 1566, it seems to us extraordinary that there would not be a similar procedure in the domestic investigative setting where, in fact, the national security interests certainly are not as great. We are talking about very serious potential constitutional violations.

Senator KENNEDY. We have to get at what we mean by informers, and whether we are talking about citizens who voluntarily furnish information, or whether we are talking about paid professionals directed by the FBI.

Mr. SHATTUCK. We are really addressing the question here of paid undercover agents who are directed and controlled, if you will, similar to the foreign agents who are defined in the wiretap bill who are, in fact, agents of the Bureau in the sense that the Bureau controls them and moves them. We understand the various distinctions in the informant area between the tipsters and the people who just might walk in off the street and give information, on the one hand, and paid undercover operatives on the other. We are not talking about those with respect to the warrant procedure, but rather the paid informers.

A further point that needs to made, I think, is that what we are really talking about here is associational privacy and the infiltration of private groups. That is why the warrant procedure is so important and why the case law that we find in the Supreme Court on this issue doesn't speak to the question that we are addressing here. The *Hoffa* case, as you know, was really a case where an informer was targeted on a particular individual and was not aimed at a group. The associational privacy point that we bring out is not one that has been addressed by the Supreme Court. Therefore, I think the argument that the Supreme Court has generally not required a warrant for informer searches is not an argument that speaks to the issue here, which is the invasion of political and associational privacy.

Senator KENNEDY. Do you have suggestions about the warrant procedure that may be different from the title III that would deal with the protection of the fourth amendment and yet deal with some of the practical problems?

Mr. SHATTUCK. A crucial point, Mr. Chairman, is this. We are talking about independent scrutiny. If that can go on at the front end in the sense that the the use of the informer, and the reason why that informer would be used, would be presented to an independent magistrate, or to a judge based upon probable cause of crime, then if that is satisfied and various procedures are put into effect for minimizing the intrusion and the time period in which the informer would be in a group that you have probable cause to believe is engaged in crime, then I think various other technical points, such as, for example, notice,

could be treated quite differently. It is obviously different from a wiretap.

We are not asking you to simply import the title III procedures, lock, stock, and barrel, into the informer area, but rather to set forth principles in the informer authorization process which would protect fourth amendment rights.

Senator KENNEDY. I would like for you to give an assessment of the guidelines. Obviously you differ as to the sufficient kind of accountability and informer procedures which have been announced that provide both in-house and Justice Department review of those. Perhaps you could submit something later as to why that does not provide sufficient independent review.

Mr. SHATTUCK. It is the independent review we are stressing. There are ways in which the guidelines are quite good now, but they are not independent and they don't speak to the kind of criminal standards that we are talking about either. Under times of stress, they could very well go by the boards.

In short, special procedures to minimize FBI interference with first amendment rights must be reinforced by a warrant requirement for criminal investigative techniques which may intrude on rights of political privacy. For the same reason that a warrant is required to conduct a wiretap, it should be used to guide and restrict the use of informants and searches of private records. The target of each of these techniques is speech, albeit in different forms, and the only way to ensure that the purpose and conduct of the search are limited to the seizure of criminal evidence is to require prior judicial approval. Nowhere is the need for judicial supervision greater than in cases involving domestic security, where first and fourth amendment rights are simultaneously jeopardized. As the Supreme Court pointed out in *Keith:*

> National security cases . . . often reflect a convergence of First and Fourth Amendment values not present in cases of "ordinary" crime. Though the investigative duty of the executive may be stronger in such cases, so also is there greater jeopardy to constitutionally protected speech. . . . History abundantly documents the tendency of Government—however benevolent and benign its motives—to view with suspicion those who most fervently dispute its policies. Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs.

The first amendment, of course, guarantees freedom of speech, of the press, of assembly and of the right to petition for redress of grievances. The Supreme Court has often observed that the effective exercise of these rights requires associational privacy. Citizens must be able to meet and associate privately to discuss their political beliefs and plans and to consider what lawful actions to take to promote their ideas. Records relating to these associational activities are protected unless they contain evidence of crime.

The right of associational privacy was firmly established by the Supreme Court in repelling the effort of the State of Alabama to compel disclosure by the NAACP of its membership lists. (*NAACP v. Alabama*, 357 U.S. 449 (1958.) It was sustained and emphasized most recently by the Court in its decision modifying certain intrusive disclosure provisions of the Federal Election Campaign Act. (*Buck-*

ley v. *Valeo*, 424 U.S. 1 (1976).) As Chief Justice Burger pointed out in his concurring opinion:

> [S]ecrecy and privacy as to political preferences and convictions are fundamental in a free society. . . . This Court has seen to it that governmental power cannot be used to force a citizen to disclose his private affiliations, even without a record reflecting any systematic harassment or retaliation. . . . For one it is far too late in the day to recognize an ill-defined "public interest" to breach the historic safeguards guaranteed by the First Amendment.

If the first amendment prevents the Government from compelling disclosure of information related to lawful political and other associational activity, it must also require restraints to be imposed on the use of intrusive investigative techniques to gather such information. In fact, it is for this reason that the restraint of a warrant procedure has been imposed upon Government wiretapping. Surely, the first amendment is no less violated if the FBI obtains a copy of the membership or contribution lists of the Socialist Workers Party through the use of paid informers or the search of the party's bank records than if the party's membership and contributor information is obtained through a wiretap or as a result of the campaign reform law. Indeed, the first amendment violation is compounded when it results from an intrusive search which also raises fourth amendment questions. This is why we believe that a warrant requirement should be imposed on the use of informers and record searches in criminal investigations.

One, in regard to informers, the FBI record on the use of paid informers in political groups shows a massive violation of first amendment rights. Although the worst abuses in the last three decades occurred in the undercover provocations of the Cointelpro and Cominfil programs, the Church committee documented many examples of routine informer activities which cut deeply into associational privacy. The committee's final report points out that during the 1964–76 period:

> The FBI expanded its use of informers for gathering intelligence about domestic political groups, sometimes upon the urging of the Attorney General. No significant limits were placed upon the kind of political or personal information collected by informers, recorded in FBI files, and often disseminated outside the Bureau.

These vast informer operations were typified by the following: By 1972, 7,402 ghetto informants, for example, "the proprietor of a candy store or barber shop", had been put in a place as FBI listening posts to provide information about racial activities [and] identify extremists passing through or locating in the ghetto area.

In 1964 the FBI had infiltrated the Communist Party USA at a ratio of 1 agent for every 5.7 members.

In 1970 FBI Director Hoover lifted restrictions against recruiting 18- to 21-year-old informers, and field officers were urged to take advantage of this tremendous opportunity to expand coverage of New Left collectives, communes, and staffs of underground newspapers.

Between 1966 and 1976 the Chicago FBI office paid more than $2.5 million to 5,145 informants and investigated or opened filed on 27,900 organizations and individuals.

The General Accounting Office reports that 48 percent of all domestic security investigations were provided by an FBI informer, a

percentage almost 3 times higher than the most commonly used source for opening an investigation.

As recently as fiscal year 1976 the FBI budget allocated $7.4 million for its intelligence informant programs, more than twice the sum for organized crime informers. These statistics reveal the magnitude of the informer issue and its impact on associational privacy. But the issue is even larger than the statistics indicated. Informers are at once the most complex, comprehensive and unpredictable investigative tools that the Bureau employs. While the informer is, as the Church committee pointed out, a vacuum cleaner for information, the information is often distorted or inaccurate and in this respect is far less reliable than information obtained by wiretap. Furthermore, an informer who pretends to be a member of a political group cannot simply gather information. He or she must participate actively in the decisionmaking of the organization, taking stands on issues and seeking to enhance their credibility by influencing the positions the organization takes and the actions it engages in.

Inevitably, as Alan Dershowitz has pointed out in his penetrating account of a Jewish Defense League murder case in which his client turned out to be an informer, the informer corrupts the organization:

> Violence inevitably stems from a police system that recruits (and educates) secret informers and provocateurs within a radical movement. The recruited agent, almost by definition, is an unstable, psychotic, or psychopathic individual. His temptation to improve his status by engaging in or encouraging violence is almost irresistible. This is what touches off the fatal chain reaction. Violence feeds on violence and the question of who is informer, who is terrorist, becomes confused beyond comprehension even by the individual involved.

In our view, the case for warrants is overwhelming. While it is true that the Supreme Court has held that an individual has no independent fourth amendment right to be free from warrantless informer surveillence, *Hoffa* v. *United States* at 385 U.S. 293 (1966), the Court has never directly addressed the question of what restrictions may be constitutionally required when informers are used to conduct surveillance of private, political and other associational activities. The Court has intimated, however, that here the balance would shift and a warrant would be required. As Justice White put it in his opinion in *United States* v. *White*, 401 U.S. 745, 752 (1971), upholding the legality of a wired informer targeted at an individual, our problem, in terms of the principle announced in *Katz* v. *United States*, at 389 U.S. 397 (1967), is what expectations of privacy are constitutionally justifiable—what expectations the fourth amendment will protect in the absence of a warrant. Since an expectation of associational privacy is constitutionally justifiable, the first and fourth amendment converge to require a warrant for the use of informers in criminal investigations of groups.

To sum up, Congress should enact a warrant procedure similar to title III of the Omnibus Criminal Control and Safe Streets Act and for the use of paid and directed undercover agents by the FBI to investigate criminal acts by members of a group. No warrants should be issued authorizing the infiltration of political organizations not suspected of engaging in specific criminal conduct. This new procedure is necessary to protect first as well as fourth amendment rights, and is urgently required to ensure that political freedom will not again be trampled upon by FBI domestic security activities.

With regard to records searches, another form of intrusive search which raises both first and fourth amendment questions is the warrantless inspection of private records. Most people believe in the privacy of their personal tax records, bank records, employment records and other recorded third party information about how they lead their lives. This expectation of privacy has often proved to be unjustified, although in constitutional terms it would certainly appear to be justifiable. As the California Supreme Court recently pointed out in invalidating a warrantless search of copies of canceled personal checks in the custody of a bank:

> For all practical purposes, the disclosure by individuals or business firms of their financial records to a bank is not entirely willful since it is impossible to participate in the economic life of contemporary society without maintaining a bank account. In the course of such dealings the depositor reveals many aspects of his personal affairs, opinions, habits, associations. Indeed the totality of bank records provides a virtual current biography. The development of photocopying machines, electronic computers and other sophisticated instruments have accelerated the ability of Government to intrude into areas which a person normally chooses to exclude from prying eyes and inquisitive minds. Consequently, the judicial interpretations of the reach of the Fourth Amendment constitutional protection of individual privacy must keep pace with the perils created by these new devices.

Informal investigative searches of private records have become increasingly routine in recent years. With the arrival of new computerized storage systems and methods of facilitating access to and exchange of computerized information; for example, the bank industry's fledgling electronic funds transfer system, Government investigations have turned increasingly to private records. At the same time, legislation such as the Bank Secrecy Act of 1970, has facilitated record searching by requiring private records to be retained for longer periods of time. In short, a revolution in information technology has far outstripped the expectations people have about the privacy of their personal records.

> There are many recent examples of informal access to bank records. Congressional investigations and ACLU lawsuits have uncovered the following:
>
> A California supporter of radical causes discovered that his checking account statement had been reviewed by FBI agents when an internal bank memo was mistakenly sent to him which read: "This memo is to authorize you to read checks to the FBI before sending the statement to the customer. . . ."
>
> As part of a series of FBI domestic security investigations, the bank accounts of Jane Fonda, Dr. Benjamin Spock, Floyd McKissick and other antiwar and civil rights activists were inspected without legal process.
>
> A memo to FBI field offices from Director Hoover in 1968 stated: "there is a need to compile in a single investigative report a clear-cut picture of the entire New Left Movement which will identify its . . . sources of funds. . . ."

The FBI inspected and copied the checks of civil rights activists in Philadelphia and Detroit to make a record of their professional activities, including, in one case, a lawyer-client relationship.

Record researches are an important and permissible criminal investigative technique. Nevertheless, they can intrude substantially on associational privacy and therefore raise the same first and fourth amendment issues that arise in the case of informer searches. Although the Supreme Court has held that a warrant procedure is not constitutionally required for bank records searches, statutory guidance is clearly needed in this area. We propose several principles as a point of departure. First, a person's privacy interest in bank, tax, credit,

and employment records should be recognized by statute. Second, a person's standing to assert his or her privacy rights over records in the hands of third parties should be conferred by statute, on the same basis as if the records were in his or her personal possession. Third, Government investigators should not be able to obtain access to the records without legal process; that is, an administrative summons, subpena or search warrant issued on a showing appropriate to the method of process. Fourth, in all instances except the issuance of a search warrant, the record subject should be given prior notice of the proposed inspection and a reasonable time to assert his or her rights before disclosure. These proposals are set forth in more detail in title II of H.R. 6051, and they parallel various other pending record privacy bills.

There is a mystique about the use of record searches in law enforcement. The trail of paper and computer tape is said to be somehow different from the trail of physical evidence—so much so that the old-fashioned rules do not apply. Though there has been much talk about the need for broad search powers to fight organized crime and white-collar crime, the restriction of investigative methods within recognized constitutional boundaries would not prevent vigorous law enforcement efforts against these types of criminal violations. Where the impact would be the greatest is where the abuses have been the greatest in the use of secret, unrestricted governmental access to private records for the collection of political intelligence; access to the telephone toll records of newspaper reporters to pinpoint the sources of politically embarrassing inside stories; acces to the bank records of antiwar and civil rights groups to identify their contributors; access to the records of political opponents in election campaigns or outspoken critics of Government policies; had a completely free hand. Elimination of these abuses is the purpose of the procedures we are proposing.

Senator KENNEDY. Perhaps you could give us your assessment of the guidelines when they become available.

Mr. SHATTUCK. We would be happy to accommodate you in that regard. This is an active subject in Congress.

Mr. SHATTUCK. I have just a couple of last points. We feel that it is critically important that at the end of all this investigative standard-setting and abolition of the domestic security jurisdiction of the FBI and the warrant procedures, that we still include two flat prohibitions to reflect the record of abuses. One, the FBI should not be permitted to investigate any person or group solely on the basis of first amendment activities. That, as you know, is in the wiretap bill.

Two, the charter must ban preventive action and Cointelpro-type activities. I think at this stage it should be noncontroversial, but the point is that we are now in quiet times when you can assess these matters, and I think reach agreement with the Bureau that they should be prohibited. Certainly, in less quiet times, I think the Bureau could very well be seeking that kind of authority again. It is important to make sure that it is not permitted and that this specific prohibition go into the statute.

Finally, we don't need to go into any detail about the whole question of oversight. This is something that you, Mr. Chairman, are right now engaged in by holding these hearings. It is very important that a long-

term oversight process be set up, even after the charter is enacted and information provided to this committee and other committees.

Senator KENNEDY. Does it make any sense to develop an outside group of citizens that would review that on an ongoing and continuous basis and report back? I recognize the importance of congressional oversight. I am talking about these particularly sensitive areas. I have not formulated this in my mind, but we might explore that something along that line with you. That is, we might get an outside group that would review this in very careful detail in some of these areas. I don't, obviously, think it replaces the process and procedures which you have outlined, but there may be some means and mechanisms to get additional kinds of protections.

Mr. SHATTUCK. Again, I would say that the characters should establish effective oversight mechanisms. Within the Justice Department, the Attorney General should be required to ensure Department and Bureau compliance with the law and to conduct a periodic review of agency investigative activities. The Attorney General must have full and complete access to Bureau files. Within the Congress, the Judiciary Committee should also have access to all FBI files under appropriate privacy safeguards, and should be required to conduct prior review of all procedures designed to implement the legislation. The Attorney General should be required to report FBI violations of charter provisions which violate constitutional rights to the committees.

Public oversight is also necessary and requires the statute to mandate that all investigatory guidelines and regulations be published in accordance with the Administrative Practices Act.

Mr. BERMAN. Mr. Chairman, I think the outside group is a good idea. I know that civilian review boards are put in quotations these days, but there is a civilian review board, and that is the Intelligence Oversight Board for intelligence activities in the administration. It looks at these activities as a public board. It has three members, but maybe with wider nominating procedures like the Legal Services Corporation, you can get a cross-section of people to participate in this.

My closing remark is that we think this is an urgent matter. The investigatory charter is the most important thing that has to be done with respect to the Bureau. Recently the Attorney General has been talking about a law enforcement charter, a total charter for the FBI which covers every aspect of their investigatory authority. I think those are worthwhile things for this committee to consider, but I think that they should not be further delayed for getting at this basic issue and as more comprehensive charters develop down the line then those titles can be fitted into it.

We should focus on this, and we particularly want to commend you, Mr. Chairman, for attempting to get a deadline for the administration to submit its proposals. We have been waiting for two years for this task force which has continued to operate, but have failed to produce a draft.

Mr. HALPERIN. I would like to say one word on informants because I feel very strongly about the critical role of that. The cases on the legitimacy of informants focus on the citizens' obligation to report criminal activity. Where the informants are reporting on legal activity, I think there is no obligation, and indeed, it becomes a disruptive element. There are two cases now pending. One is the Socialist Workers

Party case in New York and the other a case against the FBI in Chicago. Both of them have produced orders by the judges requiring turning over informants names, and both of which have produced a great deal of information about informants and how they actually function in domestic political organizations. I would urge this committee to look at this, perhaps by getting attorneys from those two cases to come here and testify.

The judge in New York has said what seems to me to be the critical point, "There is an inherent destructive force simply by the fact that informants occupy policymaking roles where they have a clear conflict of interest by virtue of their position as FBI informants." That is Judge Griesa in New York after looking at the files of the Socialist Workers Party informants.

It seems to me that two simple principles are required. One is to prohibit FBI informants from occupying policymaking roles in political organizations. The second is to require warrants where informants are going to be in the process of gathering political information. I think those two principles go to the heart of trying to get a control over what remains a widely used FBI technique of having informants in political organizations and in situations where they gather political information.

Senator KENNEDY. Your testimony has been very constructive and helpful; we value your help as we move forward in this inquiry. It is valuable to me personally and other members of the committee. Thank you.

We have your full statement which will be inserted here and we thank you very much.

The committee stands in recess.

[Whereupon at 12:45 p.m., the committee was adjourned.]

PREPARED STATEMENT OF ACLU

We welcome the opportunity to testify here today on the urgent need to develop a statutory charter to govern the Federal Bureau of Investigation and to state our views on critical issues which must be resolved. Concurring in your view that this is a matter of paramount legislative priority, we commend you for initiating these deliberations and look forward to working with this Committee and the Congress in a concerted effort to enact a statutory charter into law.

This legislation is long overdue. For two years both the Congress and the previous and present Administration have repeatedly said that the FBI charter is urgent, yet we are only now getting down to business.[1] In this regard, we are particularly pleased that you prodded the Justice Department to come forward in July with some kind of proposal for an investigatory charter. We also share your view that this is the first priority and that the Administration's recent call for a comprehensive FBI and even Federal "law enforcement" charter must not become a reason to further delay the resolution of basic issues.[2]

[1] E.g. Testimony of former Attorney General Edward H. Levi and Deputy Assistant Attorney General Mary Lawton on Wednesday, Feb. 11, 1976, in *"FBI Oversight"*, Hearings Before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary House of Representatives (94th Cong. 2nd Sess. Serial No. 2 Part 3) (Hereinafter cited as *House Judiciary FBI Oversight Hearings*) pp. 253–262; Testimony of Attorney General Griffin Bell before the Subcommittee on Government Information and Individual Rights of the House Government Operations Committee, June 6, 1977; and Recommendations in the "Final Report of the Select Committee to Study Government Operations with Respect to Intelligence Activities", *Book II*, United States Senate, (94th Cong. 2d. Session. Report 94–755 (Government Printing Office; April 26, 1976) (Hereinafter cited as *Church Committee Final Report Book II*) pp. 289–341.

[2] This is a recent position of the Justice Department and the Federal Bureau of Investigation. Testimony of Attorney General Griffin Bell before the Senate Judiciary Committee, April 20, 1978. See also Prepared Statement of Attorney General Griffin Bell before the Subcommittee on Civil and Constitutional Rights Committee on the Judiciary U.S. House of Representatives, February 28, 1978.

We emphasize the necessity for the Committee to focus its principal work on defining the criminal investigatory jurisdiction of the Bureau. While we agree with the Justice Department that a comprehensive FBI charter should be developed to place all of the Bureau's investigatory, police training, support, and liaison functions under law, we believe there are compelling reasons for the Committee to make the establishment of statutory standards and procedures for FBI investigations the first order of business.

While other jurisdictional issues are of vital concern to the ACLU, as for example, the Bureau's role in maintaining and disseminating criminal history data,[3] we view the investigatory charter as a matter of considerable urgency and see no valid reason to delay its consideration and enactment pending the resolution of these other issues. When a more comprehensive charter is worked out over time, the investigative statute can easily be included as one or more of its titles.[4]

THE NEED FOR AN INVESTIGATORY CHARTER

The massive and disturbing public record of investigative abuse by the FBI is the primary impetus for charter legislation. While we can hope that these programmatic abuses are in the past, we must bear in mind that the central conclusion of each of the many congressional inquiries is not that investigative abuses were committed but that they occurred largely because the FBI's investigative powers are undefined, unchecked, and unregulated by statutory standards and procedures.[5]

As the framers of the Fourth Amendment understood, the unchecked power of the Executive branch to investigate poses a fundamental threat to constitutional liberty. As the Supreme Court said in the *Keith* case:

"[T]hose charged with [the] investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing these tasks. The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech." [6]

Significantly, the Court, in pointing out the inherent danger of an unchecked "executive discretion" to investigate, invited the Congress to establish statutory standards and procedures for sensitive investigative techniques.[7] The essential validity of this historical judgment and the burden of congressional responsibility extend to the whole of the investigatory process.

Since the inception of the modern Federal Bureau of Investigation in 1935,[8] the Congress, by enacting a multitude of criminal statutes, has greatly expanded the criminal investigatory authority of the FBI.[9] At the same time, it has permitted the Executive Branch to exercise a claimed "inherent power" to overlay this authority with a formidable intelligence jurisdiction.[10] Yet the Congress

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[3] See Testimony of Aryeh Neier, Executive Director, American Civil Liberties Union on S. 2008, the Criminal Justice Information and Protection of Privacy Act of 1975 on July 16, 1975, in "Hearings on the Criminal Justice Information and Protection of Privacy Act of 1975 before the Subcommittee on Constitutional Rights of the Committee on the Judiciary United States Senate" (94th Cong. 1st Sess. July 15 and 16, 1975) (56–833 U.S. Gov't Printing Office Washington : 1975).

[4] As for example S. 1566, the Foreign Electronic Surveillance Act of 1977 is proposed as an eventual part of Title III of the omnibus S. 2525, the National Intelligence Reorganization and Reform Act of 1978, introduced on February 9, 1978, 95th Cong. 2d Sess.

[5] See, e.g. *Church Committee Final Report Book II, Note 1 supra* at page 289: "The Committee's fundamental conclusion is that intelligence activities have undermined the constitutional rights of citizens and that they have done so primarily because checks and balances designed by the framers of the Constitution to assure accountability have not been applied." See also Comptroller General of the United States, "Report to the House Committee on the Judiciary FBI Domestic Intelligence Operations . . . Their Purpose and Scope: Issues That Need to be Resolved" (General Accounting Office: Feb. 24, 1976) p. 26) Hereinafter cited as *GAO FBI Audit*).

[6] *United States* v. *United States District Court,* 407 U.S. 297, 317 (1972).

[7] *Id.* at 769.

[8] The Division of Investigation was first designated as the Federal Bureau of Investigation by the Act of Mar. 22, 1935, ch. 39, title II, 49 Stat. 77, and has been so designated in statutes since that date.

[9] For the development of the Bureau's investigative jurisdiction, see chapter on "Criminal Jurisdiction", in Ungar, Sanford J., *FBI: An Uncensored Look Behind the Walls* pp. 67–83 (Atlantic Little Brown 1976).

[10] See Generally "The Development of FBI Domestic Intelligence Investigations", in Supplemental Detailed Staff Reports on Intelligence Activities and the Rights of Americans *Final* Report Book III of the Select Committee to Study Governmental Operations with respect to Intelligence Activities United States Senate (94th Cong. 2d Sess. Report No. 94–755 April 23, 1976) pp. 373–558.

has declined to define how the FBI is supposed to exercise this authority except in the most rudimentary fashion. The Attorney General is simply authorized to direct the FBI "to detect . . . crimes against the United States." [11] Nowhere in the United States Code does the Congress set out standards and procedures to guide the Bureau in detecting crime: [12] the basis for initiating investigations; the standard that must be met to conduct intrusive investigations; or guidelines to control the use of investigative means.[13] As for the Bureau's "domestic security" mission, the Code is simply silent.[14]

This Congressional deference to the Executive has been destructive of civil liberties and damaging to law enforcement. It has resulted in:

Broadscale intelligence surveillance of lawful political activity in violation of the First Amendment right to privacy of political association;

Routine investigation of citizens without probable cause or reasonable suspicion of crime in both domestic security and criminal cases in violation of the Fourth Amendment;

Extensive use of paid and directed informants without adequate guidelines or procedures for independent review contrary to the spirit and purpose of the Fourth Amendment;

Inspection of confidential records without subpoena in violation of the Fourth Amendment; and

Use of investigative techniques to "chill speech" in violation of the First Amendment.[15]

This list does not even include clearly illegal activities such as use of intrusive surveillance techniques (e.g., break-ins, wiretaps, mail-opening) without judicial warrant or COINTELPRO actions to "disrupt and neutralize" political groups.[16]

While most of the public record available relates to investigative abuse committed by the FBI in its conduct of domestic security operations, there are re-

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[11] 28 U.S.C. 533.

[12] Former Attorney General Edward H. Levi interpreted the "detect" clause of 28 U.S.C. 533 to mean that the Bureau must follow a criminal standard of "investigating persons or incidents when there is a reason to believe that a federal crime has been or is likely to be committed so that the violators can be prosecuted or the crime prevented." See Attorney General Edward H. Levi, *Address to the American Bar Association*, August 13, 1975. But of course, that was not the interpretation of former officials of the Department of Justice nor necessarily the interpretation of future Attorneys General.

[13] Section 3052 of Title 18 defines the powers of Bureau agents such as carrying firearms, serving warrants, and subpoenas, but only sets a standard for arrest: "with or without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony."

[14] Former Attorney General Edward H. Levi found authority for "non-criminal" intelligence investigations in clause 3 of 28 U.S.C. 533 which authorizes the Bureau to "conduct such other investigations regarding official matters under the control of the Department of Justice and the Department of State as may be directed by the Attorney General." See Attorney General Edward H. Levi, *Address to the American Bar Association*, August 13, 1975. But the history of this language, originally in the Bureau's appropriations bill, indicates that only foreign intelligence or counterintelligence investigations could have been intended and not domestic security investigations. That is why the FBI relied so heavily on President Roosevelt's Executive Directive of September 1939. See *Development of FBI Domestic Intelligence Investigations*, Note 10 *supra*, pp. 395–407. In should be noted however, that the FBI has, over its history used the "penumbra" interpretation of certain political conspiracy statutes like the Smith Act, 18 U.S.C. 2385 and the Voorhis Act, 18 U.S.C. 2384 to derive an intelligence authority from what were intended as criminal statutes under which persons were to be prosecuted. See *Development of FBI Domestic Intelligence Investigations*, Note 10 *supra*, pp. 448–454. But particularly, see "Brief on FBI Authority For Domestic Intelligence Investigations" in *GAO FBI Audit*, Note 5 *supra*, Appendix IV, pp. 199–200. Both the GAO and the present Attorney General, Griffin Bell, are "uncertain" whether the FBI has statutory authority to conduct domestic intelligence investigations. *Id.* at 209; Testimony of Attorney General Griffin Bell before the Subcommittee on Government Information and Individual Rights of the House Government Operations Committee, June 6, 1977.

[15] See Generally *Church Committee Final Report Book II*, Note 1, supra. See also Halperin,, Morton H. and Berman, Jerry J. eds., *The Abuses of the Intelligence Agencies* (Center for National Security Studies: 1975); and Helperin, Berman, Borosage, and Marwick, *The Lawless State: The Crimes of the U.S. Intelligence Agencies* (Penguin 1976)

[16] See sources cited at *Id.* and also the following Reports: "COINTELPRO: The FBI's Covert Action Programs Against American Citizens"; "Warrantless FBI Electronic Surveillance", "Warrantless Surreptitious Entries: FBI 'Black Bag, Break-ins And Microphone Installations"; and "Domestic CIA and FBI Mail Opening" in Supplementary Detailed Staff Reports on Intelligence Activities and the Rights of Americans *Final Report Book III* of the Select Committee to Study Governmental Operations with respect to Intelligence Activities United States Senate (94th Conf. 2d Sess. Report No. 94–755 April 23, 1976)

ports that "black-bag jobs," "suicide taps" and other abuses have also occurred in FBI organized crime investigations.[17]

The damage to law enforcement is obvious. In pursuing the dissenter and the merely suspect, and in overreaching the law, the Bureau has squandered valuable public resources[18] which should have been devoted to serious crime, destroyed public trust in its own institution, and exposed agents to civil and criminal liability.

We cannot and should not rely primarily on the courts to resolve these basic issues. In criminal cases, the only means the courts have to control the investigatory function is the exclusionary rule. But increasingly the rule is looked on with disfavor by both judges and legal scholars.[19] It is obviously ineffective in providing standards or remedies for investigative abuses in a majority of cases which are never prosecuted, and in all intelligence investigations where prosecution is not the aim.[20] Although we believe it is required by the Fourth Amendment, the exclusionary rule is wholly inadequate as a mechanism for establishing general investigative policy, the primary objective here, since review is on a case-by-case basis. In a number of recent decisions, the Supreme Court has strongly suggested that it is the Congress that must legislate standards and procedures for investigations.[21]

Reliance on Executive control of investigations is the very core of the problem which legislation must redress. Despite the promise of the Justice Department to develop guidelines for all investigations two years ago, the existing guidelines remain incomplete. Domestic Security Guidelines have been promulgated [22] but there are no similar guidelines for criminal investigations.[23] Moreover, although more strict than previous internal security procedures, the current Domestic Security Guidelines authorize ongoing intelligence investigations of lawful political activity and can be read to permit many of the same kinds of investigations that the Congress has so recently criticized.[24]

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[17] "F.B.I. Crime Inquiries Reportedly Tainted", New York Times, October 6, 1977, p. A–1; "New Inquiry By U.S. Into F.B.I. Activities", New York Times, October 8, 1977, p. A 24. See Villano, Anthony, *Brick Agents Inside the Mafia for the FBI* (Quadrangle 1977).

[18] According to the Church Committee, the cost of FBI domestic intelligence is $20 million annually. Church Committee Final Report Book II. Note 1, *supra*, p. 18. The General Accounting Office audit shows that most of this money was spent on useless, overboard investigations. See *GAO FBI Audit*, Note 5, *supra*. The GAO reaches the same conclusion in its followup report. Report of the Comptroller General of the United States, "FBI Domestic Intelligence Operations: An Uncertain Future" (November 9, 1977) (hereinafter cited as *Followup GAO FBI Audit*). This is discussed *infra*. In the Organized Crime area, the GAO states that strike forces have wasted $80 million in the last decade. Report to the Congress by the Comptroller General of the United States, "War on Organized Crime: Faltering Federal Strike Forces Not Getting Job Done (March 17, 1977) (hereinafter cited as *GAO Organized Crime Study*).

[19] See e.g. Amsterdam, Anthony G. "Perspectives On The Fourth Amendment, 58 *Minn. L. Rev.* 348 (1974).

[20] See e.g. *Terry* v. *Ohio*, 392 U.S. 1, 13–15 (1968).

[21] *Id.* See also *United States* v. *United States District Court*, 407 U.S. 297 (1972); *Laird* v. *Fatum*, 408 U.S. 1, 15 (1968): "(S)uch a role ('to confine the military to their legitimate sphere of activity and to protect appellants' allegedly infringed constitutional rights') is appropriate for the Congress acting through its committees and the 'power of the purse'. . . ."

[22] Justice Department Guidelines for Domestic Security Investigations, March 10, 1976; White House Personnel Security and Background Investigations; Reporting on Civil Disorders and Demonstrations Involving a Federal Interest; and Use of Informants in Domestic Security, Organized Crime, and other Criminal Investigations (January 5, 1977)

[23] Despite a 2-year promise to develop guidelines in all investigative areas, this Committee knows from the testimony of the Department on April 20, 1978 that the task has not been accomplished. A little less than one year ago, the Department Task Force, established during the Ford Administration but which operates also in the Carter Administration's Justice Department stated that "originally" we "had intended . . . that we would draft all the guidelines to cover not only domestic security but also the whole range of investigative activities that the FBI is engaged in. That wasn't possible, so we adopted guidelines as we went along." *Testimony of Justice Department Task Force Officials on FBI Charter Proposals and the Attorney General's Domestic Security Guidelines, before the Subcommittee on Civil and Constitutional Rights of the Judiciary Committee of the House of Representatives*, June 6, 1977 (*hereinafter Justice Department and FBI 1977 Testimony*). (quote from draft hearing transcript.)

[24] While the problem here is that guidelines however strict might change, the Justice Department Guidelines are not very strict. Although these guidelines are not before us today, a couple of observations. The Church Committee pointed out that intelligence officials inside the FBI interpret the Guidelines to authorize continuing investigations of "subversives." *Church Committee Final Report Book* II, Note 1, supra, p. 318. The Committee also

Most important, the Guidelines derive their authority from the Executive's claim of an "inherent power" to conduct intelligence investigations.[25] In the past, this claim has permitted the exact scope of the investigatory power to remain nebulous. In the absence of public debate. Executive guidelines have been and may always be interpreted broadly.[26] Even strict guidelines may be altered by a stroke of the Executive pen. The Bureau has already represented that some of the guidelines are too restrictive.[27] The Administration has found that criminal investigative guidelines are "not possible" to develop.[28] Guildelines, as the Administration has so aptly put it, are only "stop-gap measures."[29] They do not resolve basic issues.

Only an investigative charter can provide a firm foundation for civil liberties Guidelines and the election of a new Administration make no lasting fundamental changes. The primary reason for the decline in the number of investigations, according to the Bureau, is that "the political/social climate changed."[30] Today the FBI is only investigating individuals and organizations who have committed criminal acts.[31] But the social climate will certainly change. Civil liberties should not rest on mere circumstance. The Carter Administration has left the door open for a reassertion of broad inherent powers in the domestic security area. It has never admitted error or offered to settle any of the many civil suits challenging past abusive surveillance practices.[32] Without statutory redress, Congress invites repetition of past abuse. Executive discretion perpetuates the danger of overzealous efforts to "detect" crime.

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interpreted them as on their face overboard. *Id.* As did the GAO, in concluding that "the language in the draft guidelines would not cause any substantial change in the number and type of domestic intelligence investigations initiated." *GAO FBI Audit*, Note 5 supra, p. 150. The GAO interpretation was of earlier drafts of the Domestic Security Guidelines. But in the finally promulgated guidelines of March 10, 1976, the standards of investigation articulated were not much tighter. Although stating that the purpose of investigations was to ascertain "information on the activities of individuals, or individuals acing in concert which involve or will involve the use of force or violence and the violation of federal law," the "involve of will involve" standard is diluted by following sections which authorize the FBI to initiate preliminary investigations on the basis of mere "allegations" and full investigations if persons or groups "may be" engaged in activities that involve or will involve violence. The Attorney General, Edward Levi, admitted that a more "flexible" standard was required to explain the choice of "may be" over "are involved" or "will be involved." See Testimony cited at Note 1 *supra*. We believe the Guidelines recodify in Executive Order the premise the FBI has always used to investigate possible violations of the Smith Act, 18 U.S.C. 2385. First the person or group does not have to be engaged in violence but simply "involved" or at some time "involved" in activities which are violent. Their intent may be legal and others illegal but no matter. Second, the threat of violence may be in the distant future. Full investigations are based on a "may be" standard rather than the more definite "will involve" standard which comes at the preamble of the Guidelines. Efforts to make the test more definite by talking about the Bureau weighing the magnitude of the harm and likelihood of its occurrence do not work because there is no explanation of how to weight the balance. For example, if the harm would be large, "overthrow of the government", the FBI could argue that the likelihood of its occurance could be remote. This is a standard that leaves us right where we were before the Guidelines. Although the number of Bureau investigations is down substantially, the major reason, as Bureau officials admit, is that the "social/political climate changed" and because the FBI is operating on even more strict guidelines for "quality over quantity" which focus investigations on persons or groups with a long-history of violence or who are reasonably believed to have committed crimes of violence. See *Justice Department and FBI 1977 Testimony*, Note 23 *supra*.

[25] If there is no statutory basis for the Domestic Security Jurisdiction of the FBI, as pointed out in Note 14 *supra*, then the Guidelines can only be authorized under claim of inherent power to conduct national security intelligence activities.

[26] See Committee on Federal Legislation of the Association of the Bar of the City of New York, "Legislative Control of the FBI" p. 10 (May 1, 1977) (hereinafter cited as *New York Bar Report*)

[27] "We do . . . have some concern about the limitation on the use of previously established informants. . . . We hoped to deal with informants in greater depth and detail and give far greater consideration than we were able to devote at the time the domestic security guidelines were adopted and for that reason some of the rules are stated in rather shorthand fashion and will have to be thought out again." *Justice Department and FBI 1977 Testimony*, Note 23 Supra (quotes from hearing transcript).

[28] *Ibid.*

[29] *Ibid.*

[30] *Ibid.*

[31] *Ibid.*

[32] The present Justice Department is arguing proper investigative conduct in the following exemplary cases: *Halperin* v. *Kissinger* (D.D.C. 1187–73) (reasonableness of wiretap, immunity of President or Government officials from liability); *Halkin* v. *Helms*, Civil Action No. 75–1773 (D.D.C.) (legality of warrantless NSA electronic surveillance and lack of harm to First Amendment rights arising out of CIA Operation CHAOS); *Lamont* v. *U.S.* Civil No. 77–c–1029 (E.D.N.Y.) (no liability for illegal mail opening); *Socialist Workers Party* v. *Attorney General*, 73 Civ. Action 3160 (S.D.N.Y.) (legality of 40 year surveillance).

Today we will focus our testimony on the case for the five basic reforms which a statutory charter must institute:

First, the charter must abolish the domestic intelligence jurisdiction of the FBI.

Second, the charter must only authorize intrusive investigations pursuant to a criminal standard, excluding conspiracy as a basis for investigation when First Amendment activity may be involved. The purpose of such investigations should be the gathering of evidence for arrest and prosecution.

Third, the charter must establish strict statutory procedures governing investigations which may intrude on lawful First Amendment activity in order to insure that they are properly authorized and conducted so as to minimize the intrusion.

Fourth, the charter must establish a judicial warrant procedure governing the FBI's direction of informants or undercover agents to infiltrate associations in authorized criminal investigations.

Fifth, the charter must prohibit the FBI from engaging in "preventive action" or COINTELPRO-type activity.

These proposals are embodied in the model legislation, *A Law to Control the FBI*,[33] and in H.R. 6051,[34] now before the House. Although they are controversial, we hope that over the course of these hearings the Committee and the Congress will become convinced that their enactment is both wise public policy and necessary for the protection of fundamental constitutional liberties.

THE CASE AGAINST DOMESTIC SECURITY INVESTIGATIONS

Domestic security investigations are intelligence investigations undertaken by the Federal Bureau of Investigation primarily to prevent acts of political violence rather than to effect criminal prosecution. Although the FBI never recognized such a distinction in the past, domestic security investigations are today defined as distinct from counterintelligence investigations because the violent acts they are intended to anticipate and prevent are not undertaken for or on behalf of a foreign power.[35] Most of the intelligence investigations conducted by the FBI, from investigation of "subversive activities" to investigations of radicals and extremists, in fact fall in this category.[36] Today domestic security investigations are authorized to anticipate and prevent the violent overthrow of the government, civil disorders, and domestic terrorism.[37]

The value of domestic intelligence does not outweigh the risk to civil liberties. Over the course of our history, we have always recognized the tension between maintaining an open, democratic society and protecting that society from violent disruption. Repeatedly we have established "domestic security measures" in response to perceived threats to our social order. In every case, from the Alien and Sedition Acts through the "Palmer Raids" in the 1920's and the loyalty and

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[33] Committee for Public Justice, The American Civil Liberties Union, and The Center for National Security Studies, *A Law to Control the FBI*, Feb. 15, 1977.

[34] H.R. 6051, 95th Cong. 1st Sess. April 5, 1977. See also H.R. 4173, 95th Cong. 1st Sess. March 1, 1977. (In H.R. 6051, domestic security investigations are prohibited and criminal investigations regulated in Titles I and II In H.R. 4173, see Tables II and III, including the warrant requirement for the use of informants.)

[35] The Church Committee made no distinction between counter-intelligence and domestic security investigations in making its recommendations. See Recommendation 44, *Church Committee Final Report*, Note 1, supra, p. But S. 1566, the Foreign Intelligence Surveillance Act of 1977 does recognize a distinction and includes lower standards for counterintelligence and counterterrorism investigations involving wiretapping than presently exist for domestic security wiretaps which are governed by The Safe Streets Act under a Probable Cause of Crime Standard. The line is difficult to draw, but the issue is mooted for us by the sure passage of S. 1566 and its House counterpart H.R. 7308, unless we permit lower standards in domestic security investigations.

[36] See *Development of FBI Domestic Intelligence Investigations*, Note 10, *supra*, notes the historical blurring of investigations premised on counteracting communist influence COMINFIL and later investigations of civil rights groups, anti-war activists, civil disorders, and the rest. We contend that most of these investigations were premised on "anti-communism" and the belief that violence and disorder were communist inspired. Remove the anti-communist bias and these investigations are investigations of "home grown tomatoes" as the FBI referred to the Socialist Workers Party. But caution that to maintain the "foreign connection" premise or presumption, however developed, would blur the distinction in the future. The Congress will have to deal with the boundary line between counterintelligence and domestic security or criminal investigations. If the boundaries are not drawn in favor of higher standards and a presumption that a foreign power is not involved, domestic security guidelines or statutes prohibiting these investigations will not protect citizens since "foreign connection" is so easy to find and may be involved in most cases.

[37] See Domestic Security Guidelines of March 10, 1976, cited at note 22 *supra*.

security programs in the 1950's, to the recent revelations of massive covert FBI surveillance and disruption of lawful political activity over the last four decades, these measures have proved far more damaging to our society than protective of it.

Yet today we are considering the continuation of a domestic intelligence jurisdiction for the FBI. The new threat to which we are responding is political terrorism.[38] Persistently we rely on these demonstrably dangerous measures because of our stubborn adherence to two basic assumptions: (1) that it is possible "to draw the fine line between legitimate conduct and illegitimate investigation of advocacy and association" and thereby minimize the threat to civil liberties; and (2) that domestic security operations can substantially prevent or reduce political violence. These assumptions permit the assertion that "on balance" the benefits outweigh the risks. The only problem then is to design proper guidelines and effective oversight.[39]

These assumptions are thoroughly debunked by the evidence. By definition domestic intelligence investigations require surveillance of lawful political activity. Particularly in times of social turmoil, those charged with a preventive intelligence mission have been unwilling or unable to distingush between vigorous citizen dissent and real security threats.[40] At least in part because of this misdirection, domestic intelligence operations have failed to accomplish their goal. Moreover, there is significant evidence that these efforts are counterproductive in stemming political violence and often have the opposite effect. Given these facts of life, sound public policy, based on the need to protect fundamental constitutional rights as well as society from serious violence, must reject this fruitless and dangerous course.

Reaching this conclusion in no way implies that we do not consider terrorism to be a serious potential threat to the fabric of our society and to our democratic institutions. Rather it is based on a large body of empirical evidence on the public record which, contrary to traditional dogma, indicates that preventive intelligence, to the extent that it is conducted within "tolerable boundaries," is useless for preventing terrorism and that "less intrusive means" may well be more effective. The evidence indicates that "more of the same" is not what is called for in meeting this serious potential threat. The Committee should use the opportunity afforded by calmer times to make different and wise public policy.

1. Drawing the line is impossible

It is not difficult to fathom why the Church Committee found its effort "to draw the fine line between legitimate conduct and illegitimate investigation of advocacy and association" for preventive intelligence investigations "the most difficult . . . to draft." [41] Nor is it hard to understand why the Justice Department's effort to do the same is interpreted by some FBI officials to authorize continuing investigation of "subversives." [42] It is simply not possible to make the necessary distinction within the framework of a domestic intelligence authority.

If their objective is to permit the FBI to prevent a crime before it occurs, intelligence investigations, by definition, must be initiated without reasonable suspicion that a criminal *act* has been, is being, or is *about* to be committed.[43] FBI agents will inevitably focus investigative attention on persons who vigorously dissent against government policy or social conditions, or groups who advocate the need for radical, or revolutionary change, even though these activities

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[38] See Statement of Clarence Kelley, Director, FBI, before the Civil and Constitutional Rights Subcommittee of the House Judiciary Committee, February 11, 1976, in *House Judiciary FBI Oversight Hearings*, note 1, *supra*, pp. 262–65. See generally, National Advisory Committee on Criminal Justice Standards and Goals, *Report of the Task Force on Disorders and Terrorism* (LEAA 1976) Rejecting the focus on "subversives" in the Justice Department Guidelines, the Church Committee recommended a more narrow focus on terrorism. See Recommendation 44 Discussion, Church Committee Final Report Book II, pp. 320–323. How much more *narrow* this could turn out to be is debatable.

[39] A most exemplary statement of this balancing technique in the domestic security area is the reasoning of the Supreme Court in the *Keith* case. United States v. United States District Court, 407 U.S. 297 (1972).

[40] The *Keith* case, cited in note 39 *supra*, also contains the warning that domestic security "standards" are overrun as a matter of historical fact in our history. See quote at page 25 infra from 407 U.S. 297 at 314.

[41] Church Committee Final Report Book II, Note 1, *supra* at p. 321.

[42] See discussion, note 24 *supra*.

[43] Recent amendments have changed the National Security Wiretap Standard for targeting persons engaged in international terrorism from probable cause to a reasonable suspicion because of the need for greater flexibility to prevent the harm from occuring. See Report to Accompany S. 1566 from Senate Committee on Intelligence (Report No. 95–701, 95th Cong. 2d. Sess. March 14, 1978), p. 26.

are constitutionally protected. Dissenters are visible and reasonable targets of intelligence investigations which are supposed to prevent politically motivated violence. Moreover, if the investigative purpose is to piece together a "web of intelligence" which intelligence agents claim to require to distinguish the real threats of political violence from "legitimate conduct," investigators have to gather information about all of the plans, activities, beliefs, associations and memberships of suspect individuals and groups.[44] This danger is particularly acute when the principal investigative technique is the planted informer who cannot be entrusted with the decision to decide what is relevant or significant activity which may signal possible violence.[45] The inevitable result is the very evil which the guidelines and charters are intended to prevent: ongoing investigations of lawful political activity in violation of free speech and associational privacy protected by the First Amendment,[46] unreasonable searches and seizures in violation of the Fourth Amendment,[47] and a concomitant "chilling effect" on all political activity when citizens are subjected to a fear of investigation, exposure, and reprisal if they engage in unpopular political activity.[48]

Because the specifics of the Justice Department Guidelines and the Church Committee Recommendations are not at issue at this time, we simply point out that we have analyzed them in terms of their potential overbreadth and concluded that they can be interpreted to permit many of the kinds of investigations which occurred in the past.[49] The late Senator Philip Hart expressed our view succinctly in his dissent from the Church Committee's recommendation:

"The Committee was concerned about authorizing such extensive investigations before there is a 'reasonable basis of suspicion' the subject will engage in terrorism. The Report offers examples of how this recommendation would work, and indicates our desire to insulate lawful political activity from investigation of terrorism. But these very examples illustrate how inextricable the two may be at the outset of an inquiry into an allegation or ambiguous information. The task of finding out whether a dissident is contemplating violence or is only involved in vigorous protest inevitably requires investigation of his protest activities. In the process, the FBI could follow the organizers of the Washington peace rally for three months on the basis of an allegation that they might also engage in violence." [50]

While some may argue that this is a strained reading of the Guidelines and Church Committee recommendations, tumultuous times produce such interpretations. President Roosevelt's secret 1939 Executive Directive only instructed the FBI to investigate violations of sabotage, espionage, treason, and violations of the neutrality laws. This Directive became the principal basis for much that followed.[51]

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[44] For the expression of this view, see Response of former FBI Director Clarence M. Kelley to the GAO FBI Audit and critique of the Guidelines in *GAO FBI Audit*, note 5 supra, Appendix V, p. 213: "Limiting domestic intelligence investigations to preventing force and violence could restrict the gathering of intelligence information useful for anticipating threats to national security of a more subtle nature. This is the case because, in our view, such a limitation would protect from governmental inquiry those plotting to undermine our institutions during their preliminary stages of organization and preparation and thus inhibit the development of an *intelligence college* upon which to base meaningful analysis and predictions as to future threats to the stability of our society." (Emphasis Supplied)

[45] The basis, we believe, for the "vacuum cleaner" metaphor for what informants do with respect to private information—sweep it up without distinctions being made. See "The Use of Informants in FBI Intelligence Investigations" in Supplementary Detailed Staff Reports on Intelligence Activities and the Rights of Americans Final Report Book III of the Select Committee to Study Governmental Operations with respect to Intelligence Activities United States Senate (94th Cong. 2d Sess.) (1976) pp. 225–271.

[46] A line of cases develop these propositions, e.g., *NAACP* v. *Alabama*, 357 U.S. 449 (1958); *Bates* v. *Little Rock*, 361 U.S. 516 (1960); *Buckley* v. *Valleo*, 424 U.S. 1 (1976) See discussion *infra* on use of informants without judicial warrant for their exposition.

[47] *United States* v. *United States District Court*, 407 U.S. 315, 313–14 (1972): " 'Historically the struggle for freedom of speech and press in England was bound up with the issue of the scope of the search and seizure power' Marcus v. Search Warrant, 367 U.S. 717 . . . (1961)."

[48] *NAACP* v. *Button*, 371 U.S. 415 (1963) but see *Laird* v. *Tatum* 408 U.S. 1 (1972) stating that there is no standing to challenge the existence of an intelligence system merely because it exists. "Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm . . ." Id. at 14. Note however, that the Court noted that the allegations were of surveillance by overt techniques. *"We are not cited to any clandestine intrusion by a military agent." Id.* at 9. Recent cases have distinguished Laird on this ground, when specific intelligence activities are alleged. E.g. cases cited at note 32 *supra*.

[49] See discussion in Note 24 *supra*.

[50] *Church Committee Final Report Book II*, Note 1, *supra* at 359–60.

[51] See generally *Development of FBI Domestic Intelligence Investigations*, Note 10, *supra*, particularly 405–07.

2. Preventive intelligence is ineffective and counterproductive

The inevitable costs of these intelligence activities require the Congress to carefully assess their value before authorizing them. Based on the public record, the Bureau's "offer of proof" to support its mission, and the General Accounting Office's intensive audit of FBI Domestic Intelligence, and its follow-up study appropriately titled "FBI Domestic Intelligence Operations: An Uncertain Future," [52] there is literally no evidence to support the value of domestic intelligence in anticipating or preventing acts of political violence.

According to the Church Committee, "between 1960 and 1974, the FBI conducted over 500,000 separate investigations of persons and groups under the 'subversive' category, predicated on the possibility that they might be likely to overthrow the government of the United States. Yet not a single individual or group has been prosecuted since 1957 under laws which prohibit planning or advocating action to overthrow the government;" [53]

According to the GAO audit of some 17,528 FBI domestic intelligence investigations of individuals in 1974, only 1.3% resulted in prosecution and conviction, and in only "about 2%" of the cases was advance knowledge of any activity—legal or illegal—obtained.[54]

In reviewing 101 organization files, the GAO found only 119 instances where activities where anticipated by the FBI. Only 12% of these activities could conceivably involve violence. There is no record of whether the FBI prevented any of this potential violence. The FBI contends these statistics might be unfair because they concentrate on individuals rather than groups. In response, GAO states that its "sample of organizations and control files were sufficient to determine that generally the FBI did not report advance knowledge or planned violence." In most of the 14 instances where such advance knowledge was obtained, it related to "such activities as speeches, demonstrations or meetings—all essentially non-violent." [55]

Invited to supply more supportive information to the Church Committee, the FBI produced a memorandum in which 3 cases of prevention were detailed.[56]

The general finding of the GAO establishes that the anticipation or prevention of violence by the FBI just does not happen. "Investigations of sabotage, certain bombings, and riot violations, and protection of foreign officials, although handled as part of the FBI's domestic intelligence oeprations, usually involved criminal acts committed before the investigations were initiated." [57]

One of the main reasons advanced for expanded collection of information about urban unrest and anti-war protest was to help responsible officials cope with possible violence. However, as the Church Committee reports, a "former White House official with major duties in this area under the Johnson Administration has concluded in retrosepct that 'in none of these situations . . . would advance intelligence about dissident groups [have] been of much help,' and that what was needed was 'physical intelligence' about geography of major cities, and that the attempt to 'predict violence' was not a successful undertaking." [58]

The Bureau's failure occurred during a period when it operated covertly "with no holds barred." [59] None of the major outbreaks of political violence which are cited to support the need for a preventive intelligence jurisdiction were anticipated or prevented: the civil disorders of the 1960's, the campus disorders of the 1970's, the Capitol Bombing, the political assassinations and attempts, the violent activities of the Weather Underground or the SLA.[60]

So long as "prevention" remains the goal of domestic security investigations, new restrictions and procedures will further insure failure. The often heard criticism that these restrictions, necessary to protect civil liberties, will "tie the hands" of the FBI's intelligence agents is not unfounded.[61] The follow-up Report

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[52] *Followup GAO FBI Audit*, Note 18 *supra*.
[53] *Church Committee Final Report Book II*, Note 1, *supra*, p. 19.
[54] *GAO FBI Audit*, Note 5, *supra*, pp. 140–144.
[55] *Ibid.* p. 144.
[56] *Church Committee Final Report Book II*, Note 1, supra, p. 18, fn 101.
[57] *GAO FBI Audit*, Note 5, *supra*, pp. 3–5.
[58] *Church Committee Final Report Book II*, note 1, *supra*. p. 19. Testimony of Joseph Califano.
[59] "This is a rough, tough, dirty business, and dangerous. It was dangerous at the times. No holds were barred. . . . This is a rough, tough business," as William C. Sullivan the late and former Assistance to the Director put it. "COINTELPRO: The FBI's Covert Action Programs Against American Citizens" in Supplemental Reports. Note 16 *supra*, p. 7.
[60] See examples cited by Clarence M. Kelly in his testimony cited as note 38 *supra*.
[61] See *Report on Disorders and Terrorism*, Note 38 *supra*, pp. 145–148: "Many of the approaches to legislative regulation now under discussion would seriously compromise the ability of police to cope with the problems of criminal disorders and terrorist activities." *Id.* at 146.

of the General Accounting Office Report, *FBI Domestic Intelligence Operations: An Uncertain Future*, realistically describes the dilemma:

"Despite the improvements in the direction and control of domestic intelligence, there are still few visible results. . . . Realistically this may be the best that can be expected, particularly in view of the greater investigative restrictions now placed on the FBI and [in view of] its past record when there were fewer restrictions and less control." [Emphasis supplied.] [62]

Moreover, there is considerable evidence that preventive intelligence measures are in fact counterproductive. Instead of serving to detect and prevent violence, they have the opposite effect of making crime detection more difficult and violence more likely.

By focusing on the dissenters and protesters in order to ferret out potential violence, intelligence agencies play into the hands of terrorists. As the aim of the terrorist is to both intimidate and create symapthy for his or her cause by convincing people that repression makes violence necessary, overreaction by authority is a key element in the strategy. If police investigate innocent persons or those sympathetic to the "cause" of the terrorist, the police confirm or appear to confirm the truth about repression. By violating constitutional rights, intelligence agencies unwittingly help to promote the success of terrorist tactics.[63]

By engaging in overbroad surveillance, intelligence agencies create paranoia and distrust of the police which makes detection of terrorists more difficult. To cite just two examples, the reason why the FBI has had great difficulty in overtaking the SLA and Weather Underground is that a significant segment of the public has been unwilling to establish their whereabouts to the police and some people have helped these groups stay underground. Intelligence investigations have made them "enemies" of the police and they wrongly but understandably identify with other "enemies" of the police. Without public trust in police authority, which is undermined by surveillance or fear of surveillance, FBI *criminal* investigators are hindered in legitimate efforts to enforce the law.[64]

Finally, by taking "preventive actions" or using illegal means, an intelligence agency becomes the mirror image of the terrorists it is supposed to thwart. When a police agency becomes a kind of terrorist organization using intimidation and violence to achieve public ends, that is a far worse threat than Black September or FALN, or SLA. Official terror is the ultimate evil in modern times,[65] and the FBI, as the public record shows, used tactics in its intelligence mission which we associate with police states: from the compilation of emergency detention lists to COINTELPRO.

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A total change in emphasis is required. Instead of focusing on political dissent, the FBI should zero in on illegal conduct. The appropriate alternative is criminal investigations conducted under strict standards and procedures. Both the administration and key elements of the Congress are apparently coming to the same conclusion.[66]

When we first testified in favor of prohibiting domestic intelligence investigations two years ago, only the Pike Committee and [67] a number of public organiza-

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[62] *Followup GAO FBI Audit*, Note 18 *supra*, p. 6.

[63] Hacker, Frederick J., M.D., *Crusaders, Criminals, Crazies: Terror and Terrorism in Our Time* (Norton 1976).

[64] *Ibid.* 137–78. "Between seven and twelve people succesfully evaded literally thousands of FBI and other security forces mobilized for the specific purpose of discovering them. The SLA members did not even feel compelled to keep a low profile. They popped up periodically in Berkeley or in San Francisco . . ." Id. at 158. "Five hundred ninety-one days passed betwen Patty's totally involuntary kidnapping by the SLA and Tania's totally involuntary capture by the FBI." *Id.* at 169.

[65] *Ibid.* p. 4: "Even in democratic societies, counterterrorist activities can, by use of electronic surveillance, clandestine infiltration, illegal searches, and similar actions, compound the violation of the values that they intended (or pretend) to protect. Inadvertently or by design, counterterrorist campaigns often adopt the tactics they presumably abhor and for the sake of efficiency, become as terroristic as the activities against which they fight." See Hacker Generally on this point. See also, Rosenbaum, Jon H. and Sederberg, Peter C., eds. *Vigilante Politics:* Order without Law. Defining the problem, they use the term "Official vigilantism." *Id.* at 16.

[66] As Hacker states, "Lip service is readily given to the novelty of the phenomenon of modern terrorism, but nobody dares touch the traditional law enforcement routines . . . These days everybody is willing officially to acknowledge the necessity for novel measures in meeting moral challenges; but when it comes to brass tacks, the brass wants to depend on the old methods that have failed . . ." *Ibid.* at 246.

[67] Recommendations of the House Committee on Intelligence, Feb. 11, 1976, House Report 94–833 (recommending abolition of the Internal Security Branch of the FBI).

tions,[68] including the United Automobile Workers and Common Cause, advocated a similar flat ban.[69] Both the Justice Department under former Attorney General Levi [70] and the Senate Select Committee on Intelligence Activities (the Church Committee) [71] recommended that the Congress authorize limited preventive intelligence investigations because of the necessity to "anticipate and prevent" political violence before it occurs.

Recently, however, a number of House members,[72] including the Chairman of the FBI Oversight Committee of the Judiciary Committee, the newly constituted Senate Intelligence Committee, and the Justice Department have taken the position that criminal investigative standards under strict procedures should be used in domestic security related cases. Chairman Don Edwards of the FBI Oversight Committee has introduced legislation which would accomplish this result (H.R. 1040).[73] The Chairman of the Senate Intelligence Committee, Senator Birch Bayh, also a member of this Committee, announced on February 9 of this year that the Intelligence Committee had declined to include domestic security investigations in the foreign intelligence charter, S. 2525, "because they should be treated as law enforcement rather than intelligence functions." [74] Now the Attorney General has adopted a similar view, which he described in recent testimony before the House Judiciary Committee:

"*Last year we began efforts to draft legislation dealing with the domestic security investigations of the FBI. It quickly became apparent, however, that it is unsound, both legally and practically, to isolate this particular subject from other areas of FBI criminal investigative responsibility.* There is no real difference between investigations of criminal enterprises bent on violence for political motives and criminal enterprises bent on violence to extend the influence of organized crime for economic gain. Murder, assault, bombing and extortion are weapons equally adapted to calling attention to a political cause or enforcing a loan-sharking or kickback agreement. Whatever the motivation, the same investigative techniques come into play in attempting to identify the persons or organizations behind these acts, determining who provides the leadership and bringing a halt to such crimes. *The only distinction is that greater safeguards for the protection of First Amendment rights should be provided in the investigation of crimes undertaken for political reasons.* [Emphasis supplied.] [75]

The FBI's current policy in the domestic security area is itself a compelling argument for the appropriateness of abolishing the dometstic security jurisdiction. The Bureau has transferred all domestic security investigations to its Criminal Division. Despite the arguably broad jurisdiction granted by the Justice Department Guidelines, the Bureau, in its own "quality over quantity" approach, has limited itself to investigating only "individuals and organizations involved in crimes against the U.S. which involve acts of violence." [76] Instead of wasting time and resources and infringing rights by trying to prevent violence before it occurs, the Bureau seems to be trying to prevent violence by detecting and prosecuting those who commit crimes of violence in order to deter such acts.

PROHIBITING OTHER DOMESTIC SECURITY INVESTIGATIONS

In order to close down the Bureau's domestic intelligence jurisdiction, the charter must preempt all executive orders and limit the FBI to the conduct of criminal investigations. The charter must also carefully define the FBI's investigatory responsibility in the areas of civil disorders and background investiga-

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[68] Most recently, the committee on Federal Legislation of the Association of the Bar of the City of New York. See New York Bar Report, note 26 *supra*.

[69] See Letter to Senate Intelligence Committee on FBI Charter Recommendations, March 11, 1976 (on file at Center for National Security Studies).

[70] See Testimony of Attorney General Levi cited at note 1, *supra*.

[71] Recommendation 44, *Church Committee Final Report Book II*, note 1, supra, p. 321.

[72] For example, H.R. 6051 has 29 co-sponsors, a low number only because the bill also bans all covert operations abroad and espionage by the United States except in time of War.

[73] 95th Cong. 1st Sess. December 15, 1977.

[74] News Release Senate Select Committee on Intelligence, Statement of Senator Birch Bayh, Chairman, Senate Select Committee on Intelligence on the Introduction of the National Intelligence Reorganization and Reform Act of 1978, Feb. 9, 1978, p. 7.

[75] Statement of Griffin B. Bell, Attorney General, before the Subcommittee on Civil and Constitutional Rights Committee of the Judiciary, U.S. House of Representatives, February 28, 1978, p. 15–16.

[76] *Justice Department and FBI 1977 Testimony*, note 23 supra.

tions. These functions must no longer constitute a basis for intelligence investigations.[77]

Civil disorder information gathering must be strictly limited. The Attorney General must authorize collection only if there is a clear and immediate threat of violence likely to require the calling out of federal troops. Only temporary (30 days) collection should be permitted and the FBI should be limited to the use of overt techniques unless a full criminal investigation is authorized. The Bureau's authority to gather information [78] about planned demonstrations should be similarly restricted.

The scope of the Bureau's authority to conduct background and security investigations should be reassessed and explicitly defined. No background investigation should be conducted without the subject's consent. Only information relevant to the legitimate purpose of the investigation should be collected or maintained; dissemination should be tightly controlled. Because of the inherent tension between the FBI's counterintelligence and background investigative functions, the Committee should seriously consider the transfer of most of this authority to the Civil Service Commission.[79]

A STANDARD FOR FBI CRIMINAL INVESTIGATIONS

The Congress must define carefully the FBI's criminal investigatory authority. The charter should mandate that the primary purpose of a criminal law enforcement investigation is to "detect . . . crimes against the United States," identifying the perpetrators and gathering evidence to establish the basis for arrest and prosecution. The Congress can thus insure that the FBI will not conduct "intelligence" investigations.

Of particular importance, the Congress must establish an investigatory standard which the FBI must meet before it can conduct a convert, intrusive criminal investigation. We believe the FBI may not conduct an intrusive investigation unless it has a reasonable suspicion, based on specific and articulable facts and rational inferences from such facts, that the subject of an investigation, whether a person or a group, has committed, is committing, or is about to commit a specific act which violates a federal criminal statute.

The Supreme Court in *Terry* v. *Ohio* [80] held that a reasonable suspicion standard must be met to justify a search pursuant to an investigation. Specifically, the Court stated that:

"In justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts reasonably warrant that intrusion. [81]

This holding does not resolve the issue of what kind of "reasonable suspicion" justifies a full criminal investigation. But the "specific violation of law" basis for investigation is a logical extension of the *Terry* decision to the "particular intrusion" we are considering here. In *Terry* the police were only required to have a reasonable suspicion that "criminal activity may be afoot," [82] but the Court emphasized that this was only a limited "stop and frisk" and not a "full-blown search." [83] An on-going criminal investigation, which involves covert, intrusive techniques such as continuous physical surveillance, inspection of private records, and use of paid and directed informants is more akin to a "full-blown search"

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[77] For authority to assist President in assessing need for troops in civil disorders as basis for FBI intelligence gathering, see *Development of FBI Domestic Intelligence Investigations*, note 10 *supra*, pp. 489–518. For history of background investigations as basis for authority to collect intelligence by FBI, see Id. at pp. 431–35.

[78] This a stricter version of the Justice Department Guidelines on Civil Disorders and Demonstrations Involving a Federal Interest Reporting Guidelines, note 22 supra. And also stricted than Recommendations 45–46, Church Committee Final Report Book II, pp. 323.

[79] Consent is now a requirement under Justice Department Guidelines on White House Personnel Security and Background Investigations, note 22 *supra*. But the dissemination rules need to be tightened. See Recommendation 47, *Church Committee Final Report Book II*, pp. 323–24. Transfer to the Civil Service is mandated by Law to Control the FBI and recommend for consideration by the New York City Bar Association Report, note 26 *supra*, p. 35. Actually more generally a transfer to "another agency."

[80] 392 U.S. 1 (1968).

[81] *Id.* at 21.

[82] *Id.* at 30.

[83] *Id.* at 19.

requiring a higher degree of certainty that criminal conduct is involved than to a "stop and frisk".[84] In such investigations, where the FBI does not have probable cause to arrest or does not use techniques which require a search warrant,[85] we believe the Constitution requires the Bureau to meet the standard we have proposed.

We do not propose a "probable cause" standard, which both the Attorney General and FBI Director have indicated might be workable,[86] because we are attempting to articulate a standard of investigation that is not premised on "conspiracy" statutes. In our view, reasonable suspicion of a specific act in violation of law is a tighter investigatory standard than probable cause of conspiracy, and the only standard that can protect constitutional rights adequately.

In the past, the FBI has conducted massive investigations of lawful political activity premised on the violation of conspiracy statutes such as the Smith Act (18 U.S.C. 2385) and Voorhis Act (18 U.S.C. 2386) which on their face punish lawful speech and advocacy.[87] We recommend the repeal of these statutes by this charter legislation.[88] However, even if they are repealed, the use of general conspiracy statutes (18 U.S.C. 371) in conjunction with statutes prohibiting substantive conduct as a predicate for intrusive investigation perpetuates the problem. The Report accompanying the recently enacted S. 1437 which repeals the Smith Act poses the issue:

> The Code more appropriately leaves this area to the general conspiracy provision (section 1002), which will make it an offense to conspire to violate either section 1101 (Treason) or 1102 (Armed Rebellion or Insurrection).[89]

In case law, the courts emphasize the inherent danger in prosecuting persons engaged in First Amendment activity under conspiracy statutes.[90] Constitutionally protected conduct could be punished. Conspiracy statutes, on their face, prohibit associations established for illegal purposes. An overt act, which may be lawful, is sufficient to prove the crime. Alternatively, if the association for the purpose that would be illegal can be shown, then an illegal act by one associate may be attributed to all other members of that association.[91]

The problem in the First Amendment area is that vigorous dissent by political associations often involves advocacy of acts which would be illegal if committed (e.g. overthrow of the government or disruption of a governmental function). Overt acts which might suffice to prove conspiracy in a criminal case such as attending meetings and raising funds are the stuff of political activity. Consequently, the courts have required a showing of specific intent in the prosecution

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[84] In *Terry*, the Court made much of the danger the officers faced in the situation but also that this was an area of conduct where "necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure. *Id.* at 20. The Court stressed that "we do not retreat from our holdings that the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure." *Id.* While we are not requiring a warrant here, the Court's reasoning is strongly suggestive that a higher standard is required in circumstances where a warrant might be required.

[85] The Church Committee recommended warrants based on probable cause for mail-opening and surreptitious entry. Recommendations 53 and 54. *Church Committee Final Report Book II*, Note 1, supra, p. 328. No statute is necessary to require this in the domestic security area, since these warrantless surveillances were generally recognized as "clearly illegal." Legislation is necessary to define foreign intelligence or counterintelligence warrant standards since the President has asserted inherent power to conduct warrantless surveillance for these purposes. Executive Order 12036, January 26, 1978. We also recommend warrants for use of undercover agents and intrusive record searches. See discussion *infra*. Wiretapping in the domestic security area should be prohibited as a "general search" violative of the Fourth Amendment.

[86] Testimony of Attorney General Griffin Bell before the Subcommittee on Government Information and Individual Rights of the House Government Operations and Individual Rights of the House Government Operations Committee, June 6, 1977; Testimony of William Webster, Director of the FBI on FBI Authorization Legislation before the Senate Judiciary Committee, April 13, 1978.

[87] See Text accompanying note 53 *supra*.

[88] See Section 4 of H.R. 10400 introduced by Don Edwards of California, repealing certain laws to eliminate color of authority: (Chapter 102 (relating to riots) of Title 18, Sections 2384 (relating to seditious conspiracy), 2385 (relating to advocating the overthrow of Government), 2386 (relating to registration of certain organizations), 2387 (relating to peacetime interference with loyalty, moral, or discipline of military forces), and 2391 relating to temporary extension of wartime penalty for interference with loyalty, morale, or discipline of military forces) of such title 18 are all repealed.

[89] Report of the Committee on the Judiciary, United States Senate, to accompany S. 1437: Criminal Code Reform Act of 1977 (Rept. No. 95–605 Part 1) (95th Congress 1st Sess.), pp. 185–86.

[90] *Scales* v. *United States*, 367 U.S. 203 (1961); *Yates* v. *United States*, 354 U.S. 298 (1957).

[91] *United States* v. *Spock*, 416 F. 2d. 165 (1st Cir. 1969).

of First Amendment related cases. Further, because the motives for participation may have legal or illegal aspects, the courts have refused to attribute the illegal acts of one associate to others in the group.[92]

Applying the courts' observations concerning prosecuting political conspiracies to investigating such conspiracies illustrates the shortcomings of such a basis for investigation. Reading conspiracy statutes literally, advocacy of illegal acts by persons in association justifies investigation. Moreover, commission of wholly legal overt acts, inextricably intertwined with the political process, could also justify investigation. A standard of probable cause of such activity is easily met. Even if there is no specific intent to violate the law by one or all of the associates, conspiracy statutes permit intrusive investigation of First Amendment activity. Investigatory discretion to proceed under these statutes renders a "criminal standard" an illusory protection against future investigative abuses.

The prosecutorial requirement of specific intent must be paralleled in the standard for investigation. Persons or groups should not be targeted for investigation unless there is reasonable suspicion that the substantive crime (rather than conspiracy) is about to be committed. For example, if the FBI obtains evidence of a specific threat of illegal activity by an association together with specific and articulable facts indicating that a member has purchased weapons the FBI would have reasonable suspicion that a criminal act was about to be committed. Rather than "any" overt act, only an overt act which would constitute an element of the substantive crime would justify reasonable suspicion of specific intent or imminence of illegal conduct,[93] the same requirement which the courts use to narrow the overbreadth of conspiracy prosecutions. This standard would protect First Amendment and Fourth Amendment rights without undermining the FBI's law enforcement efforts.

The FBI would not be required to "sit on its hands" until a substantive crime occurred. The criminal standard allows a full investigation before the law has been violated. More important, it should not bar the Bureau from conducting preliminary inquiries using less intrusive techniques. A charter, providing for a preliminary criminal inquiry, would allow the FBI to check its own records, conduct interviews, contact established sources of information, and use other such means to find out whether the basis for a full investigation exists.[94] Without meeting a reasonable suspicion standard, the FBI could check out specific threats, credible allegations, incidents and the like. On the other hand, if the allegation is unfounded, or in the case of a full investigation, if the substantive crime does not occur, the investigation must terminate.

Rather than hinder the Bureau, the standard would make the FBI more effective in carrying out its law enforcement responsibilities. Conspiracy predicated investigations lead to overbroad investigations which are a waste of resources on virtually fruitless attempts to prevent crime.

On the assumption that prevention may be more effective if criminals are apprehended and prosecuted, the narrower criminal standard would cause the FBI to focus its resources on solving serious crime. In point of fact, the standard we propose is a statutory embodiment of the "quality versus quantity" approach that has caused the FBI to make an internal decision to focus investigations on persons or organizations who have committed serious or violent crimes for political or economic motive.

Moreover, since most such criminal conspiracies come to the attention of the FBI after a crime has been committed, most investigative activity (within stricter procedures) that now go on would be permissible under the reasonable suspicion standard.

The "primary" purpose is to investigate and to gather evidence of crime, the FBI might still prevent crime before it occurs. The FBI could "prevent a crime" reasonably believed to be about to occur, using traditional means such as arrest, warning potential victims, and the like. The statute, as we later suggest, must prohibit COINTELPRO activities.

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[92] *Id.* See also *Scales* v. *United States*, 367 U.S. 203 (1961).

[93] *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969) in which the Court held that political groups are within their legal rights to advocate any course of action including the "use of force or law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.* at 447.

[94] This is essentially along the lines of the preliminary inquiry in the Justice Department Domestic Security Investigation Guidelines. March 10, 1976.

The narrow standard we propose is required when First Amendment activities may be investigated. The same standard is probably not constitutionally required in other criminal investigations. However, Fourth Amendment considerations remain; a criminal standard is therefore required.

The public policy issues raised by organized crime "intelligence" investigations are not unlike those raised by the debate over domestic security issues. Efforts to thwart organized crime have been largely ineffective. A recent GAO report concludes that $80 million tax dollars have been wasted by organized crime strike forces in the last decade.[95] As in the domestic security area, a major problem has been the inability to define "organized crime."[96]

Although differences between these two areas of investigative concern exist, important constitutional and practical similarities can also be noted. These similarities argue for a tight criminal standard governing organized crime investigations, perhaps the same standard which governs First Amendment related activities. We look to the Justice Department and the FBI to explain why a uniform standard would not be practicable.

SPECIAL PROCEDURES FOR FBI CRIMINAL INVESTIGATIONS

As important as it is to set standards for initiating FBI criminal investigations, the charter must also establish procedures to ensure that investigations are conducted so as to minimize interference with constitutional rights. Particularly strict procedures are necessary in cases which involve investigations of persons or groups engaged in First Amendment activities. Whenever the FBI has reason to believe that a crime has been committed, procedures are needed to prevent overbroad surveillance of lawful First Amendment activity which could "chill speech" and intrude on the privacy of political association. As Justice Powell stated the case for a special vigilance in this investigative area:

"The price of lawful public dissent must not be a dread of subjection to an unchecked surveillance power. Nor must the fear of unauthorized official eavesdropping deter vigorous citizen dissent and discussion of Government action in private conversation. For private dissent, no less than open public discourse, is essential to our free society."[97]

The type of procedural safeguards required is illustrated by one example from the recent past: the FBI's five and a half year continuous investigation of the Institute for Policy Studies, a well-known left-liberal research organization in Washington, D.C. The Institute was the victim of both unregulated, unwarranted targeting and overbroad surveillance of lawful political activities resulting from other legitimate criminal investigations. The Institute's case indicates the need to mandate procedures to regulate every stage of the investigative process. Based on discovery in a civil suit, we know that:

The FBI initiated the IPS investigation in 1968 "to determine whether the activities of the Institute and its personnel were in violation of Title 18, United States Code (USC), Sections 2383–85, relating to rebellion and insurrection, seditious conspiracy, and advocacy of the overthrow of the Government." In other words it was an investigation initiated on the basis of criminal statutes but without any evidence.

The investigation continued a full year before a "confidential source" advised that Marcus Reskin of the Institute had made all of the arrangements for a Pan-

[95] Report to the Congress by the Comptroller General of the United States, War on Organized Crime: Faltering—Federal Strike Forces Not Getting the Job Done (GAO March 17, 1977).

[96] Id. at i: "There is no agreement on what organized crime is and consequently, on precisely whom or what the Government is fighting." One dangerous consequence of this should be noted. In several state inquiries into operations of state and local police "Organized Crime Intelligence Units" funded with LEAA funds, the major finding is that organized crime for economic gain has been ignored *while the police conducted intelligence investigations, sometimes on massive scale, of organized "political activity" suspected to be illegal or subversive.* E.g. Report on the Operations of the Intelligence Division From Chief of Police, District of Columbia To Mayor Walter E. Washington, March 7, 1975; Improper Police Intelligence Activities, A Report By the Extended March 1978 Cook County Grand Jury, October 10, 1975; Report to the Senate of Maryland By the Senate Investigating Committee Established Pursuant To Senate Resolution 1 and 151 of the 1975 Maryland General Assembly, December 31, 1975; Staff Report To Michigan House Civil Rights Committee Members Regarding Inquiry into House Bills 4923, 6408, and 6409 Dealing with Police Intelligence Operations, September 1976; State Police Surveillance, Report of the N.Y. State Assembly Special Task Force on State Police Non Criminal Files, September 1977.

[97] *United States* v. *United States District Court*, 407 U.S. 297, 314 (1972).

African Conference in Algiers with money allegedly provided by IPS. Because the "tone and direction of the Conference was the result of significant Soviet influence" according to the confidential source, the investigation was continued on the basis of possible violation of 18 U.S.C. 2383–85.

The dearth of evidence in this case also indicates the license permitted by the conspiracy standard.

By this time in 1969, the investigation was more than a preliminary one, since the FBI had infiltrated the Institute with informants. Further, because Richard Barnett of IPS publicly stated that he had visited Hanoi, the FBI determined that he might be acting in violation of Title 50, U.S.C. Sections 851–58 pertaining to failure to register as an espionage agent of a foreign power. Neither the Title 18 or Title 50 investigations were ever reviewed by the Justice Department to determine whether the evidence amounted to a reasonable suspicion of a crime to warrant the investigation.

The Justice Department did enter the picture in August of 1971 when Assistant Attorney General Robert Mardian requested the FBI to resolve the "FBI investigation" which had "determined" that IPS had bought copies of the "McNamara Papers" in 1970. Eleven months after the "determination," in other words, the FBI was instructed to investigate IPS for possible violation of Title 18, U.S.C. Sections 792–98 relating to espionage.

The Justice Department and FBI officials made no effort to "minimize" the investigation or make any determination that less intrusive techniques would have been sufficient to check out the allegations of illegal activity. Assuming arguendo that a criminal standard had been met, the only named targets of investigation were Marcus Raskin (Algiers Conference) and Richard Barnett (visiting Hanoi) ("buying" the Pentagon Papers) of the Institute. Yet the FBI collected information through intrusive surveillance of all IPS personnel and associates and all IPS political meetings. Extensive files were maintained.

In 1971, the FBI investigation of the whereabouts of the Weather Underground resulted in a new avenue for investigation of IPS. On the basis that one member of the Underground "reportedly" obtained money from Arthur Waskow of IPS, prior to becoming a fugitive and that another fugitive allegedly "visited IPS offices," the FBI continued its total coverage of IPS and its political activities on the grounds that persons associated with IPS may have violated Title 18, U.S.C. Section 1071 relating to Concealing a Person from Arrest. No effort was made to prevent this legitimate criminal investigation from resulting in overbroad surveillance of IPS' First Amendment activity.

In 1971, apparently because an IPS staff associate sponsored a conference which adopted views (in the Bureau's opinion) which "identified with Arab guerillas" and later requested Marcus Raskin of IPS to finance a trip of his to the Middle East to study the political situation, the FBI determined that IPS might be involved in possible violation of Title 18, Sections 1541–46 relating to violations of Passport and Visa Matters. The investigation continued.

Between 1972 and 1974 no other "evidence" of illegal activity came to FBI attention but the investigation was not terminated until February 28, 1974, after a civil lawsuit was filed by IPS charging illegal surveillance.

Other than Assistant Attorney General Mardian's request in 1971 and an FBI Headquarters review in April 1973 (11 months before the termination of the investigation and almost five years after its commencement), there is no evidence of FBI supervision of the IPS investigation.

Over the course of the investigation, the Bureau paid or directed over 50 informants to gather information on IPS, obtained confidential documents, personal mail (from trash covers), membership lists, research documents, plans of meetings, detailed reports of what went on at meetings, and built a massive file on the organization.

In February 1974, upon discontinuing the investigation, the FBI concluded after "careful analysis" that there "was insufficient evidence to support prosecution of IPS leaders or members under existing Federal statutes." The U.S. Attorney's Office was never involved.

The Justice Department and the FBI continue to defend the conduct of this investigation as legal and proper.[98]

The charter must include requirements for procedural safeguards which ensure: (1) accountability for the authorization and conduct of investigations; (2) that

[98] Response by Defendant Clarence M. Kelley To Interrogatory No. 4 of Plaintiff's Second Set of Interrogatories To Federal Bureau of Investigation, January 23, 1978. *Institute for Policy Studies* v. *Mitchell* (Civ. Action No. 74–816) (D.C.D.).

no investigation is initiated without statutory basis; (3) that criminal investigations do not become a pretext for open-ended intelligence investigations; (4) that the least intrusive technique necessary to obtain evidence is employed; (5) that investigations are not overbroad; and (6) that privacy is not violated by unnecessary maintenance and dissemination of information.

Special provisions to achieve these ends are laid out in *A Law to Control the FBI*. They include (1) requirements for written authorization and certifications; (2) time limits for investigations; (3) Justice Department review, authorization, and supervision of continuing investigations; (4) special authorization and Justice Department mandated procedures to govern the use of intrusive techniques; and (5) requirements that minimization procedures be established. These provisions are not detailed regulations, which the Justice Department and the Bureau seem to fear. Rather they simply mandate that the Justice Department established procedures according to statutory criteria. They set appropriate limits on administrative discretion.

All of these procedures should apply in criminal cases involving First Amendment activity. But many protect against Fourth Amendment privacy violations and should apply to all criminal investigations.

WARRANTS FOR INTRUSIVE TECHNIQUES

Special procedures to minimize FBI interference with First Amendment rights must be reinforced by a warrant requirement for criminal investigative techniques which may intrude on rights of political privacy. For the same reason that a warrant is required to conduct a wiretap, it should be used to guide and restrict the use of informants and searches of private records. The target of each of these techniques is speech, albeit different forms, and the only way to ensure that the purpose and conduct of the search are limited to the seizure of criminal evidence is to require prior judicial approval. Nowhere is the need for judicial supervision greater than in cases involving domestic security, where First and Fourth Amendment rights are simultaneously jeopardized. As the Supreme Court pointed out in *Keith:*

National security cases . . . often reflect a convergence of First and Fourth Amendment values not present in cases of 'ordinary' crime. Though the investigative duty of the executive may be stronger in such cases, so also is there greater jeopardy to constitutionally protected speech. . . . History abundantly documents the tendency of government—however benevolent and benign its motives—to view with suspicion those who most fervently dispute its policies. Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs.[99]

The First Amendment, of course, guarantees freedom of speech, of the press, of assembly and of the right to petition for redress of grievances. The Supreme Court has often observed that the effective exercise of these rights requires associational privacy. Citizens must be able to meet and associate privately to discuss their political beliefs and plans and to consider what lawful actions to take to promote their ideas. Records relating to these associational activities are protected unless they contain evidence of crime.

The right of associational privacy was firmly established by the Supreme Court in repelling the effort of the State of Alabama to compel disclosure by the NAACP of its membership lists. *NAACP* v. *Alabama*, 357 U.S. 449 (1958). It was sustained and emphasized most recently by the Court in its decision modifying certain intrusive disclosure provisions of the Federal Election Campaign Act. *Buckley* v. *Valeo*, 424 U.S. 1 (1976). As Chief Justice Burger pointed out in his concurring opinion:

[S]ecrecy and privacy as to political preferences and convictions are fundamental in a free society. . . . This Court has seen to it that governmental power cannot be used to force a citizen to disclose his private affiliations, even without a record reflecting any systemic harassment or retaliation. . . . For one it is too late in the day to recognize an ill-defined 'public interest' to breach the historic safeguards guaranteed by the First Amendment.[100]

If the First Amendment prevents the government from compelling disclosure of information related to lawful political and other associational activity, it must also require restraints to be imposed on the use of intrusive investigative tech-

[99] 407 U.S. at 306.
[100] 424 U.S. at 20.

niques to gather such information. In fact, it is for this reason that the restraint of a warranted procedure has been imposed upon government wiretapping. Surely the First Amendment is no less violated if the FBI obtains a copy of the membership or contributor lists of the Socialist Workers Party through the use of paid informers or the search of the Party's bank records than if the Party's membership and contributor information is obtained through a wiretap or as a result of the campaign reform law. Indeed, the First Amendment violation is compounded when it results from an intrusive search which also raises Fourth Amendment questions. This is why we believe that a warrant requirement should be imposed on the use of informers and record searches in criminal investigations.

1. Informers

The FBI record on the use of paid informers in political groups shows a massive violation of First Amendment rights. Although the worst abuses in the last three decades occurred in the undercover provocations of the COINTELPRO and COMINFIL programs, the Church Committee documented many examples of routine informer activities which cut deeply into associational privacy. The Committee's Final Report points out that during the 1964–76 period:

The FBI expanded its use of informers for gathering intelligence about domestic political groups, sometimes upon the urging of the Attorney General. No significant limits were placed upon the kind of political or personal information collected by informers, recorded in FBI files, and often disseminated outside the Bureau.[101]

These vast informer operations were typified by the following:

By 1972, 7,402 "ghetto informants" (e.g., "the proprietor of a candy store or barber shop") had been put in place as FBI "listening posts" to provide information about "racial activities [and] identify extremists" passing through or locating in the ghetto area;[102]

In 1964 the FBI had infiltrated the Communist Party USA at a ratio of one agent for every 5.7 members;[103]

In 1970 FBI Director Hoover lifted restrictions against recruiting 18 to 21 year old informers, and field officers were urged to take advantage of this "tremendous opportunity" to expand coverage of "New Left collective, communes and staffs of underground newspapers;"[104]

Between 1966 and 1976 the Chicago FBI office paid more than $2.5 million to 5,145 informants and investigated or opened files on 27,900 organizations and individuals;[105]

The General Accounting Office reports that 48% of all domestic security investigations are initiated on the basis of information provided by an FBI informer—a percentage almost three times higher than the next most commonly used source for opening an investigation;[106]

As recently as Fiscal Year 1976 the FBI budget allocates $7,401,000 for its intelligence informant programs—more than twice the sum for organized crime informers.[107]

These statistics reveal the magnitude of the informer issue and its impact on associational privacy. But the issue is even larger than the statistics indicate. Informers are at once the most complex, comprehensive and unpredictable investigative tools that the Bureau employs. While the informer is, as the Church Committee pointed out, a "vacuum cleaner" for information, the information is often distorted or inaccurate and in this respect is far less reliable than information obtained by a wiretap. Furthermore, an informer who pretends to be a member of a political group cannot simply gather information. He or she must participate actively in the decisionmaking of the organization, taking stands on issues and seeking to enhance credibility by influencing the positions the organization takes and the actions it engages in. Inevitably, as Alan Dershowitz has pointed out in his penetrating account of a Jewish Defense League murder case in which his client turned out to be an informer, the informer corrupts the organization:

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[101] *Intelligence Activities and the Rights of Americans*, Final Report of the Select Committee to Study Government Operations with Respect to Intelligence Activities, United States Senate, 94th Cong., 2d Sess., BK. II, p. 68 ["Church Report"].
[102] *Id.*, p. 75.
[103] Marwick, "The Government Informer," *First Principles*, March 1977, p. 3.
[104] Church Report, p. 78.
[105] *Washington Post*, April 9, 1978, p. A3.
[106] 1976 *GAO FBI Audit*, Note 5, *supra*, p. 105.
[107] *Supplementary Detailed Staff Reports on Intelligence Activities and the Rights of Americans*, Church Committee Report, BK, III, p. 229.

Violence inevitably stems from a police system that recruits (and educates) secret informers and provocateurs within a radical movement. The recruited agent, almost by definition, is an unstable, psychotic, or psychopathic individual. His temptation to improve his status by engaging in or encouraging violence is almost irresistable. This is what touches off the fatal chain reaction. Violence feeds on violence and the question of who is informer, who is terrorist, becomes confused beyond comprehension even by the individual involved.[108]

In our view, the case for informer warrants is overwhelming. While it is true that the Supreme Court has held that an individual has no independent Fourth Amendment right to be free from warrantless informer surveillance, *Hoffa* v. *United States*, 385 U.S. 293 (1966), the Court has never directly addressed the question of what restrictions may be constitutionally required when informers are used to conduct surveillance of private political or other associational activities. The Court has intimated, however, that here the balance would shift and a warrant would be required. As Justice White put it in his opinion in *United States* v. *White*, 401 U.S. 745, 752 (1971), upholding the legality of a "wired informer" targeted at an individual, "our problem, in terms of the principle announced in *Katz* v. *United States*, 389, U.S. 397 (1967), is what expectations of privacy are constitutionally 'justifiable'—what expectations the Fourth Amendment will protect in the absence of a warrant." Since an expectation of associational privacy is constitutionally justifiable, the First and Fourth Amendments converge to require a warrant for the use of informers in criminal investigations of groups.

To sum up, Congress should enact a warrant procedure similar to Title III of the Omnibus Criminal Control and Safe Streets Act for the use of paid and directed undercover agents by the FBI to investigate criminal acts by members of a group.[109] No warrants should be issued authorizing the infiltration of political organizations not suspected of engaging in specific criminal conduct. This new procedure is necessary to protect First as well as Fourth Amendment rights, and is urgently required to ensure that political freedom will not again be trampled upon by FBI domestic security activities.

2. Records searches

Another form of intrusive search which raises both First and Fourth Amendment questions is the warrantless inspection of private records. Most people believe in the privacy of their personal tax records, bank records, employment records and other recorded "third party information" about how they lead their lives. This expectation of privacy has often proved to be unjustified, although in constitutional terms it would certainly appear to be justifiable. As the California Supreme Court recently pointed out in invalidating a warrantless search of copies of cancelled personal checks in the custody of a bank:

"For all practical purposes, the disclosure by individuals or business firms of their financial records to a bank is not entirely willful since it is impossible to participate in the economic life of contemporary society without maintaining a bank account. In the course of such dealings the depositor reveals many aspects of his personal affairs, opinions, habits, associations. Indeed the totality of bank records provides a virtual current biography. The development of photocopying machines, electronic computers and other sophisticated instruments have accelerated the ability of government to intrude into areas which a person normally chooses to exclude from prying eyes and inquisitive minds. Consequently, the judicial interpretations of the reach of the Fourth Amendment constitutional protection of individual privacy must keep pace with the perils created by these new devices." [110]

Informal investigative searches of private records have become increasingly routine in recent years. With the arrival of new computerized storage systems and methods of facilitating access to and exchange of computerized information (e.g., the bank industry's fledgling "electronic funds transfer" system), government investigations have turned increasingly to private records. At the same time, legislation such as the Bank Secrecy Act of 1970 has facilitated record searching by requiring private records to be retained for longer periods of time. In short, a revolution in information technology has far outstripped the expectations people have about the privacy of their personal records.

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[108] Dershowitz, *et al.*, "The JDL Murder Case: The Informer Was Our Own Client," *Civil Liberties Review*, April/May 1976, p. 59.
[109] *Burrows* v. *Superior Court*, 13 Cal. 3d 238, 243–44, 529 P. 2d 590, 593–96 (1974).
[110] *Marin County Independent Journal*, April 20, 1972, p. 1.

There are many recent examples of informal access to bank records. Congressional investigations and ACLU lawsuits have uncovered the following.

A California supporter of radical causes discovered that his checking account statement had been reviewed by FBI agents when an internal bank memo was mistakenly sent to him which read: "This memo is to authorize you to read checks to the FBI before sending the statement to the customer." [111]

As part of a series of FBI domestic security investigations, the bank accounts of Jane Fonda, Dr. Benjamin Spock, Floyd McKissick and other anti-war and civil rights activities were inspected without legal process; [112]

A memo to FBI field offices from Director Hoover in 1968 stated: "there is a need to compile in a single investigative report a clear-cut picture of the entire New Left Movement which will identify its . . . sources of funds. . ." [113]

The FBI inspected and copied the checks of civil rights activists in Philadelphia and Detroit to make a record of their professional activities, including, in one case, a lawyer-client relationship.[114]

Records searches are an important and permissible criminal investigative technique. Nevertheless, they can intrude substantially on associational privacy and therefore raise the same First and Fourth Amendment issues that arise in the case of informer searches. Although the Supreme Court has held that a warrant procedure is not constitutionally required for bank records searches, *United States* v. *Miller*, 96 S.Ct. 1619 (1976), statutory guidance is clearly needed in this area.

We propose several principles as a point of departure. First, a person's privacy interest in bank, tax, credit and employment records should be recognized by statute. Second, a person's standing to assert his or her privacy rights over records in the hands of third parties should be conferred by statute, on the same basis as if the records were in his or her personal possession. Third, government investigators should not be able to obtain access to the records without legal process—i.e. an administrative summons, subpoena or search warrant issued on a showing appropriate to the method of process. Fourth, in all instances except the issuance of a search warrant, the record subject should be given prior notice of the proposed inspection and a reasonable time to assert his or her rights before disclosure. These proposals are set forth in more detail in Title II of H.R. 6051, and they parallel various other pending record privacy bills.

There is a mystique about the use of record searches in law enforcement. The trail of paper and computer tape is said to be somehow different from the trail of physical evidence—so much so that the "old-fashioned" rules do not apply. Though there has been much talk about the need for broad search powers to fight organized crime and white collar crime, the restriction of investigative methods within recognized constitutional boundaries would not prevent vigorous law enforcement efforts against these types of criminal violations. Where the impact would be the greatest is where the abuses have been the greatest in the use of secret, unrestricted governmental access to private records for the collection of political intelligence; access to the telephone toll records of newspaper reporters to pinpoint the sources of politically embarrassing "inside stories;" access to the bank records of antiwar and civil rights groups to identify their contributors; access to the records of political opponents in election campaigns or outspoken critics of government policies, or indeed anyone at all, for the intelligence gatherers have long had a completely free hand. Elimination of these abuses is the purpose of the procedure we are proposing.

STATUTORY PROHIBITIONS REQUIRED

The statutory charter should include two flat prohibitions:

1. The FBI should not be permitted to investigate any person or group solely on the basis of First Amendment activities.[115]

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[111] Hearings of the Subcommittee on Financial Institutions, Committee on Banking, Housing and Urban Affairs, United States Senate, 92d Cong. 2d Sess. (1972), at 136–37.

[112] Church Report, BK, VI, at 667–75.

[113] Church Report, Vol. 6, at 669–75.

[114] *Jabara* v. *Kelley*, C.A. No. 39065 (E.D. Mich.); *Kenyatta* v. *Kelley*, C.A. No. 71–2505 (E.D. Pa.).

[115] Such a proviso has been added to S. 1566, the Foreign Intelligence Surveillance Act of 1977. See Report To Accompany S. 1566 from Senate Committee On Intelligence (Report No. 95–701, 95th Cong., 2d Sess. March 14, 1978) p. 28–30.

2. The Charter must ban preventive action and COINTELPRO-type activities.[116] To enforce these prohibitions the charter should establish criminal penalties for their international violation and a civil cause of action for victims.

OVERSIGHT OF THE FBI

The charters should establish effective oversight mechanisms. Within the Justice Department, the Attorney General should be required to ensure Department and Bureau compliance with the law and to conduct a periodic review of agency investigative activities.[117] The Attorney General must have full and complete access to Bureau files.[118]

Within the Congress, the Judiciary Committees should also have access to all FBI files[119] under appropriate privacy safeguards and should be required to conduct prior review of all procedures designed to impliment the legislation. The Attorney General shall be required to report FBI violations of charter provisions which violate constitutional rights to the committees.

Public oversight is also necessary and requires the statute to mandate that all investigatory guidelines and regulations be published in accordance with the Administrative Practices Act.[120]

Thank you for the opportunity to appear before this committee.

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[116] While Attorney General Edward Levi struck from the Justice Department Guidelines all reference to "preventive action" because of congressional criticism, he did not rule out authorizing such activities on a case by case basis. In testimony before this Committee, FBI Director William Webster has stated that in some cases the FBI must take preventive action measures. (April 20, 1978 Testimony). It is critical to insure that this does not include inciting dissension, dissemination false or anonymous information to discredit persons or groups, or any of the other "preventive" measures engaged in by the FBI in its COINTELPRO operations.

[117] According to the GAO, the Justice Department has deactivated the high level committee that reviewed domestic security investigations. Such a committee must be mandated by the Charter. Followup GAO FBI Audit, Note 18 *supra*, p. 6: "(T)he Justice Department's Investigations Review Unit, which is responsible for providing policy guidance on the FBI's domestic intelligence operations, is currently without staff and its future undecided."

[118] Until recently the FBI never allowed the Justice Department or even the Attorney General to have access to its case information, even though the FBI is under the supervision of the Justice Department. A statute must mandate this access. See Development of FBI Domestic Intelligence Investigations, note 10 supra for a running account of this refusal or failure to disclose.

[119] Congress must mandate that it be kept "fully and currently" informed about FBI activities. An investigation continues into the failure of the FBI to turn over all files relating to break-ins after 1966. *Washington Post*, April 22, 1978. The GAO has never been given complete access to FBI files, and has had to work with summaries. Part of the current investigation includes possible misleading information supplied to the GAO for its audit.

[120] Today the Domestic Security Guidelines are published. On the other hand the Foreign Counterintelligence Guidelines are secret and withheld under the Freedom of Information Act Exemptions. Secret directives have been the cause of much overreaching. Standards should be *public* and subject to criticism and possible revision by the Justice Department.

APPENDIX

ADDITIONAL SUBMISSIONS FOR THE RECORD

ASSISTANT ATTORNEY GENERAL
LEGISLATIVE AFFAIRS

Department of Justice
Washington, D.C. 20530

May 19, 1978

Mr. Michael Glaser
Printing & Editing Assistant
Subcommittee on Antitrust
United States Senate
Room A-517
Washington, D. C. 20510

Dear Mr. Glaser:

In the course of Attorney General Bell's testimony on a legislative charter for the Federal Bureau of Investigation on April 20, Senator Kennedy requested that the Department supply materials indicating the investigative standards used by other agencies of the Executive Branch. Enclosed are materials provided by a number of agencies in response to Senator Kennedy's request; this material is not exhaustive but it indicates the nature of the standards used.

Sincerely,

Patricia M. Wald

Patricia M. Wald
Assistant Attorney General
Office of Legislative Affairs

violate another person's privacy, disclose a source's identity or hamper future investigative capabilities.

In addition, the GAO's auditors concluded that courts have sometimes imposed their own deadlines on FBI request processing. This disrupts the FBI's ability to handle other requests efficiently, Lowe said.

In the Rosenberg case, for example, the FBI was forced to use 73 full-time and 21 part-time employees between August and November 1975 to meet a court-imposed deadline. Lowe said, "These people represented over half of the personnel then assigned to the branch. The diversion of these resources was the major reason for the rapid increase in the backlog at the time. The backlog rose by 2,000 requests during this three-month period."

A year ago, the bureau began its Project Onslaught, which was designed to reduce the backlog, which by then had grown to almost 8,000 cases. In addition to its other FOIA and Privacy Act staff, the bureau used as many as 282 special agents at a time and spent $2.8-million to attack the growing backlog. Although it did not eliminate it, the project succeeded in reducing it from 7,566 to 4,910 requests in five months.

Lowe said that unless the law is amended to give the FBI special consideration, the bureau will fall behind again with answering requests. The GAO estimated that requests would be about 20,500 in 1978 and 23,400 in 1979. Lowe said the GAO recommended that the FBI be required to acknowledge a request within 10 days and that it provide a full response within an additional 30 days. In exceptional circumstances it should give a firm date when it expects to complete its response.

According to the report, additional improvements are also needed in FBI management of its information processing. It concluded that effective implementation of the acts is hindered by uncertainties concerning what constitutes an unwarranted invasion of personal privacy, what a confidential source is and how much information should be made public in pending investigations.

GAO therefore recommended that the attorney general direct the Justice Department's Office of Privacy and Information Appeals: to provide all department components with its decisions so they can be used in future cases; to update its own processing guidelines and give them to all department components; and make random checks on FBI information processing for public release.

The GAO also suggested that the bureau should use more analysts and fewer special agents to process requests. Exemptions relied upon as the basis for withholding information should be marked on each document, the auditors recommended, and the Justice Department and its components should be required to give such additional information as number of pages in a file and number denied to persons who make FOIA requests.

NEW REGULATIONS MAKE IT HARDER
TO OPEN MAIL -- EXCEPT IN PRISON

Government opening and reading of private mail has been made more restrictive in most instances by several recent policy changes and new Federal agency regulations. However, a new Postal Service rule explicitly authorizes opening and censoring prison inmates' mail.

Mail security regulations of the U.S. Postal Service, printed in the April

5 Federal Register, permit prison authorities to read and censor incoming mail addressed to prisoners. Although prison officials have long done just that, the Postal Service concluded that its absence of regulations seemed to imply that the activity was prohibited.

If an inmate consents to receive mail at the prison, authorities can censor it. If he does not consent, prison officials can either deliver the mail unopened or return it to the Post Office marked, "Refused."

In other areas, however, new regulations at the Postal Service and the Customs Service place greater limitations on warrantless mail openings, and in most cases forbid reading of contents in opened letters. In a related action the Defense Department announced the end of a program in which suspicious letter mail from servicemen overseas was referred to the department by the Customs Service.

In general, the Postal Service regulations prohibit any opening of sealed mail without a search warrant, "even though such mail may be believed to contain criminal or otherwise nonmailable matter or evidence of the commission of a crime."

However, some categories of personal correspondence may be sent as unsealed mail postage free, and the regulations permit opening such mail to determine its eligibility. Even though this mail may be opened, strong provisions protect the privacy of the sender or addressee and the confidentiality of the contents of any correspondence. Included in this category are Braille letters and sound recordings for the blind and letters of certain other handicapped persons.

For regular categories of sealed mail, postal employees would be able to open and detain letters only in a dead mail office in accordance with dead mail regulations, with the consent of the sender or addressee, or to execute a valid search warrant. Postal rules also permit authorized agents of the Customs Service or the Agriculture Department to open certain categories of mail.

Customs Service. In conjunction with the Postal regulations, Customs Service regulations have been developed that allow Customs officials to open only mail originating outside the U.S. Customs area.

The regulations, which go into effect May 8, prohibit warrantless openings unless letters are suspected of containing contraband.

As a matter of policy, the Customs service also will refuse to give mail to other agencies without a warrant.

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Mail privacy and openings by the Customs Service have been the focus of controversy for some time. Last June, the Supreme Court ruled in U.S. v. Ramsey, 97 S. Ct. 1972, that the Customs Service acted constitutionally in opening without a warrant mail sent from Thailand. The service said it had reasonable cause to believe that the letters contained drugs. Although the Supreme Court said such openings were authorized by law, it did not rule on the constitutionality or legality of reading correspondence without a warrant.

On July 28, 1977, the Customs Service published proposed regulations to bring the agency's policies into line with the Ramsey decision, and to cover the unresolved area of reading correspondence.

In addition, last year the Subcommittee on Government Information and Individual Rights of the House Government Operations Committee held hearings on the problem.

Among the subcommittee's conclusions was one that mail opening presented questions of privacy invasion which should be settled by legislation: "Any intrusion into the right of privacy in correspondence should be structured as an exception to that right; the right should not be granted merely because other considerations permit. Any such exceptions should be expressly passed upon by the Congress."

Congressional sources said such legislation is being considered, but conceded that any final action by Congress is unlikely this year.

A spokesman for the Customs Service said the subcommittee's hearings and recommendations and comments received from the public went a long way toward setting the tone of the final regulations. He added that the regulations would govern agency activity until such time as legislation is passed.

The final regulations are somewhat more restrictive than the proposed guidelines, the agency spokesman said. In the proposed rules, Customs would have been able to turn over virtually all mail to other agencies for follow-up investigations.

According to the final regulations, correspondence in sealed letter class mail cannot be turnad over to any other agency without a warrant. However, packages that contain certain goods such as foods, drugs, cosmetics and hazardous substances may be given to agencies that have jurisdiction over such items for examination and clearance before being sent on to the addressee.

Mail can also be turned over to the Postal Service for controlled delivery without a warrant to agencies such as the Drug Enforcement Administration for further investigation.

Another change concerns the opening of mail in the Virgin Islands, considered outside the United States for customs matters but inside for postal activities. In the proposed regulations, Customs would have been allowed to open mail arriving in the Virgin Islands from the United States. The final regulations appear to prohibit such openings by the Customs Service without a judicial search warrant or the consent of the sender or addressee, even if there is reason to believe the letters contain contraband.

Both the Postal Service and the Customs Service regulations require that a postal employee must be present whenever a Customs official opens mail. Recent agreements by the two agencies set forth the procedures for implementing this provision.

According to the agreement, public confidence that Customs is carrying out its pledge to "safeguard the privacy of correspondence" can be enhanced "by providing for independent observation of customs sealed letter class mail opening and examination by a responsible postal employee."

Mail can be opened by Customs only in a facility jointly designated by the two agencies for that purpose. No mail can be opened by Customs unless a postal employee is present. After a letter has been opened, the contents cannot by examined "unless a responsible postal employee is present to observe the examination, or measures are taken to prevent the contents of the mail item which appear to be correspondence from being exposed to view."

In its explanation of the final regulations, published in the April 6 Federal Register, the Customs Service said it "is acutely aware of the sanctity of privacy in correspondence. At the same time, Customs must perform its obligations to examine all importations, whether by mail or otherwise. The Customs Service feels that this document balances those interests in a satisfactory manner."

Department of Defense. In a related action, the Defense Department announced last month that as of April 30 it would terminate its "military suspect letter class referral program."

Under the program, the Defense Department received approximately 445 pieces of mail a month from the Customs Service. Customs had seized the letters from servicemen stationed overseas on suspicion that they contained contraband. Up to August 1976, Customs also gave the Department correspondence, a department witness told the Government-Information and Individual Rights Subcommittee.

Brig. Gen. Nathaniel R. Thompson wrote the Customs Service that "the value of the program to DOD was minimal and did not warrant continuation." He said examination of mail by Customs seemed adequate to handle any problems that might exist with respect to mailing of contraband by servicemen abroad.

SUPREME COURT BLOCKS ACCESS TO SIRICA'S WHITE HOUSE TAPES

Access to copies of White House tapes in the possession of U.S. District Court Judge John Sirica has been blocked by the Supreme Court.

In a 7-2 decision on April 18, the court refused to allow a recording company and the three major television networks to have access to the tapes, which were played in court during the Watergate cover-up trial of several aides to former President Nixon.

Approximately 20 hours of tapes were played in the trials. The networks wanted to distribute copies of them to the general public through the National Archives.

The court, in an opinion delivered by Justice Lewis Powell, said the common-law right of access to court records was not absolute, but rather was at the discretion of the trial judge.

Moreover, the court reasoned, the public had an alternate means of access to the tapes. Under the Presidential Recordings and Materials Preservation Act, the General Services Administration was directed to take possession of all Presidential materials, including tapes, and screen them for eventual availability to the public.

Department of the TREASURY NEWS
U.S. CUSTOMS SERVICE WASH., D.C. 20229 - 202-566-2475

FOR RELEASE UPON RECEIPT April 20, 1978

CUSTOMS TIGHTENS REGULATIONS FOR MAIL INSPECTIONS

The United States Customs Service announced April 6 that a new and tightened regulation governing the examination of letter class mail will go into effect in May, 1978, thirty days after its publication in the Federal Register.

The policy statement accompanying the new regulation points the way toward nationwide uniformity in the examination of international mail by stating the most common circumstances that constitute "reasonable cause to suspect" that contraband or merchandise is contained within the letter.

The regulation prohibits Customs officers from reading the contents of any correspondence they discover in the course of the examination without first obtaining a search warrant or written authorization. Likewise, a warrant must be obtained before Customs can transfer correspondence to any other law enforcement agency.

All openings of letter class mail must be carried on by Customs officers or employees in the presence of a Post Office Department official.

Among the circumstances considered "reasonable cause to suspect" are:

(more)

* the alerting of a detector dog trained to uncover either narcotics or explosives;

* the X-ray detection of merchandise or contraband in the letter;

* the weight, shape, feel, or sound of an international letter class item which indicates merchandise or contraband is present;

* information from reliable sources which indicates that an identifiable mail article contains merchandise or contraband;

* special insurance on a piece of letter class mail;

* unusual packaging; and/or

* a fictitious addressee.

Notice of the amendment was published in the Federal Register of April 6, 1978 on page 14451.

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FOR FURTHER INFORMATION CONTACT: Alan Bernstein (202) 566-5286

PIN 4-06 A:PI: ABB

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[4810-22]

Title 19—Customs Duties

CHAPTER I—UNITED STATES CUSTOMS SERVICE, DEPARTMENT OF THE TREASURY

[T.D. 78-102]

PART 145—MAIL IMPORTATIONS

Examination of Sealed Letter Class Mail by Customs Officials

AGENCY: United States Customs Service, Department of the Treasury.

ACTION: Final rule and policy statement.

SUMMARY: This document contains an amendment to the Customs Regulations and a policy statement relating to the examination of sealed letter class mail by Customs officials. The amendment and policy statement are being made because of a recent United States Supreme Court decision which upheld the right of Customs officials to examine sealed letter class mail in certain circumstances. It is intended that the amendment and policy statement will offer guidance as to when and how Customs will open and examine sealed letter class mail.

EFFECTIVE DATE: May 8, 1978.

FOR FURTHER INFORMATION CONTACT:

Stuart P. Seidel, Office of the Chief Counsel, U.S. Customs Service, 1301 Constitution Avenue NW., Washington, D.C. 20229, 202-566-5478.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 145.3 of the Customs Regulations (19 CFR 145.3) provides that no Customs officer or employee shall read, or authorize or allow any other person to read, any correspondence contained in sealed letter mail unless a search warrant has been obtained. In *United States* v. *Ramsey*, 97 S. Ct. 1972 (1977), the U.S. Supreme Court affirmed the right of Customs officials to open and examine sealed letter class mail without first obtaining a search warrant under certain circumstances.

In the *Ramsey* case, a Customs officer inspecting a sack of incoming international mail from Thailand spotted eight bulky envelopes which he believed might contain merchandise. All of the envelopes appeared to have been typed on the same typewriter, were addressed to different locations in Washington, D.C., felt as if there were something other than plain paper inside, weighed three to six times the normal weight of a letter, and came from a country which is a known source of narcotics. Upon in-

spection, the envelopes were discovered to contain heroin.

The opening of these letters without first obtaining a search warrant was challenged as unconstitutional. The Supreme Court rejected this assertion and held constitutional the statute, R.S. 3061 (19 U.S.C. 482), which authorizes the opening of envelopes coming into the United States with respect to which a Customs official may have reasonable cause to suspect there is merchandise which is subject to duty or which is imported contrary to law. The Court also found that the circumstances under which the letters were opened provided "reasonable 'cause to suspect' that there was merchandise or contraband in the envelopes."

The Commissioner of Customs determined that, inasmuch as § 145.3 of the Customs Regulations was silent as to when the opening of sealed letter class mail is authorized, that section should be amended to reflect the statutory standards as interpreted in the *Ramsey* case and the existing Customs practice on the subject. Therefore, on July 28, 1977, a notice of proposed rulemaking which would amend § 145.3 was published in the FEDERAL REGISTER (42 FR 38393). The notice proposed to add to § 145.3 a provision that no Customs officer or employee would open sealed letter class mail which appeared to contain only correspondence unless a search warrant had been obtained in advance of the opening. It also proposed to add a provision that Customs officers or employees could open and examine sealed letter mail which appeared to contain matter in addition to, or other than, correspondence, provided they had reasonable cause to suspect the presence of merchandise or contraband.

The notice also contained a proposed policy statement which set forth the policies which the Customs Service would follow in examining sealed letter class mail. The policy statement supplemented the regulations by providing guidance as to the circumstances which constitute reasonable cause to suspect that merchandise or contraband is contained in sealed letter class mail.

Interested parties were given until September 26, 1977, to submit data, views, or arguments in regard to the proposals. Several comments were received in response to the proposals. A discussion of the substantive comments follows:

DISCUSSION OF SUBSTANTIVE COMMENTS

WHAT MAIL IS SUBJECT TO CUSTOMS EXAMINATION

1. *International transit mail.* One comment pointed out that the proposed rule and policy statement could be read so as to subject international transit mail to Customs examination. International transit mail is that mail which passes through the United States but is not to be delivered therein. This point is well taken. Section 145.2 therefore has been amended to make it clear that mail must be destined for delivery in the Customs territory of the United States or in the U.S. Virgin Islands to be considered subject to Customs examination.

2. *Virgin Islands mail.* In one of the comments submitted, the authority of the Customs Service to open first class mail arriving in the U.S. Virgin Islands from the United States was questioned. It was asserted that such opening could not be done merely upon finding a reasonable cause because of 39 U.S.C. 3623(d), which provides that first class mail "of domestic origin" shall not be opened unless authorized by a search warrant or by the addressee, or except by the Postal Service to determine the delivery address.

While maintaining that it is authorized to examine all mail coming into the U.S. Virgin Islands from the Customs territory of the United States, the Customs Service agrees that the legal authority to open first class mail merely upon the finding of reasonable cause to suspect the presence of merchandise or contraband is uncertain. For this reason, and because the incidence of openings of first class mail arriving in the U.S. Virgin Islands from the Customs territory of the United States would be relatively low, the Customs Service will refrain from opening such mail unless authorized to do so. Section 145.3 therefore had been amended to provide for this exception.

3. *Only at "border"?* One comment asserted that without a search warrant, Customs has no authority to examine any mail which has already passed through an exchange office. This contention is based on the theory that the "border search" exception to the Fourth Amendment prohibition against warrantless searches ceases to exist after mail passes through an exchange office.

This contention cannot be accepted. The Customs Service relies on 19 U.S.C. 1499 and *United States* v. *King*, 517 F.2d 350 (5th Cir. 1975), as authority for the proposition that Customs may examine mail after it has passed through an exchange office but has not been delivered to the addressee, at least when Customs did not inspect the mail previously. In the court case, envelopes had entered the United States at San Francisco and had been routed to Birmingham, Ala., without having been inspected. The court found Customs examination and opening of the envelopes in Birmingham, upon reasonable cause to suspect the presence of contraband, to be lawful. The court added that an individual's expectation of privacy in a mail article which enters the United States at San Francisco but is destined for Birmingham is no more offended by opening the envelope in Birmingham than in San Francisco.

DEFINITIONS ARE INADEQUATE

4. *Definitions.* Several comments were directed toward the fact that various terms such as "sealed", "letter mail", and "letter class mail" were either not defined or were used inconsistently in the proposed rule and policy statement.

In addition, it was noted that several definitions were qualified so as to be vague in the proposed Appendix.

These points are well taken. Section 145.1 has been amended to define three terms ("mail article", "letter class mail", and "sealed letter class mail"), and these terms exclusively have been used in the regulations. Furthermore, the definitions in the Appendix have been made clearer and more precise. For example, it is specifically stated that bulky envelopes and packages are included in the term "letter class mail" as long as the article is mailed at the letter rate or equivalent class or category of postage.

RECORD EACH MAIL OPENING

5. *Record should be made.* Several comments urged that a record of every opening of sealed letter class mail should be made, whether or not a seizure occurs. The comments suggested that the factors which present a reasonable cause to suspect the presence of merchandise or contraband should be recorded. Some comments proposed that the mail article itself be endorsed as opened by Customs, citing the reasonable cause, the examiner's name, and other relevant information.

These suggestions have merit and will be adopted in part. The Customs Service currently uses a stamp to endorse sealed letter class mail that has been opened. The stamp contains the mail examiner's identifying number and the place of opening. In the future, the mail article will be endorsed to also contain a code indicating the reason(s) why the mail article was opened. The examiner's number will be maintained because no useful purpose will be served by identifying the opener by name.

Customs also will make a record of each opening of sealed letter class mail, whether or not a seizure results including the reasons for the opening.

"REASONABLE CAUSE TO SUSPECT"

6. *Examples are overly broad.* One comment contended that the example given in paragraph B.7 of the proposed Appendix of "reasonable cause to suspect" the presence of merchandise or contraband are overly broad

Another comment questioned whether Customs would remain rigid in adhering to the given examples if experience shows that their reliability is suspect.

Paragraph B.7 of the proposed Appendix indicated the following factors constituted reasonable cause: The sender of the mail article is a known mailer of merchandise or contraband, or the mail article contains writing or typing of a unique character which has previously been found on mail articles containing merchandise or contraband.

We agree that each of the named factors alone should not provide reasonable cause. These factors are therefore being transferred to the list of factors which, standing alone, do not provide reasonable cause to suspect the presence of merchandise or contraband.

COOPERATION WITH OTHER AGENCIES

7. *Referring mail articles to other agencies.* Many comments were received concerning paragraph F of the proposed policy statement, which set forth the conditions under which articles of mail may be turned over to other agencies for a controlled delivery or a follow-up investigation.

One comment asserted that there is no legal authority to turn over any mail article to any agency except the Postal Service without a search warrant if Customs has not seized the article. This assertion may apply to correspondence in sealed letter class mail, but clearly does not apply to all mail articles since 19 CFR 145.57 provides that certain goods, such as plants and plant products, food, drugs, cosmetics, and hazardous or caustic and corrosive substances, are subject to examination and clearance by appropriate agencies before release to the addressee. Paragraph F is therefore being revised to specify that mail articles which do not contain correspondence may be referred to other agencies without a warrant for examination and clearance in accordance with 19 CFR 145.57.

Another comment pointed out that only the Postal Service can effect a controlled delivery, and that the provision of paragraph F that mail may be turned over to the Drug Enforcement Administration (DEA) or other Federal agencies without a warrant to effect a controlled delivery therefore was erroneous. It was suggested that the provision be changed to provide that mail may be turned over to the Postal Service to effect a controlled delivery in cooperation with DEA or other Federal agencies. This suggestion is being adopted.

8. *Mail covers.* Postal Regulations provide for the use of "covers", or surveillance, of mail when certain facts, such as the commission of a crime, are suspected (see 39 CFR 233.2). Authorization for mail covers must be obtained from the Postal Service.

One comment suggested that the circumstances presented in paragraphs B.4 and 7 of the proposed Appendix, listing examples of "reasonable cause to suspect", call for mail covers rather than the opening of the mail article.

The example in subparagraph 7 has been deleted from the list and subparagraph 4 has been reworded to read, "Information from a source previously shown to be reliable indicates that an identifiable mail article contains merchandise or contraband." The Customs Service's authority, as outlined in the *Ramsey* case, to open and examine sealed letter class mail is independent of any other authority to engage in surveillance of mail. Inasmuch as the quoted example provides the necessary reasonable cause, there is authority apart from the mail cover procedure to open such mail. For this reason, this suggestion is not being adopted.

9. *Interagency agreements.* It was urged that Customs seek to standardize its cooperative agreements with other agencies concerning mail examination. Moreover, it was suggested that the agreements be treated as rules requiring public notice and opportunity for comment.

The Customs Service is attempting to standardize these agreements with other agencies to the fullest extent possible. It must be recognized, however, that some differences necessarily will occur because of different interests and procedures involved.

On the other hand, interagency agreements of this type are not rules requiring public notice and opportunity for comment within the meaning of 5 U.S.C. 551. In addition, any agreement would have to comport with both agencies' regulations and policies on the subject. For these reasons, the suggestion that public notice and opportunity for comment be given for interagency agreements on mail examination will not be adopted.

ARE MORE SAFEGUARDS NEEDED?

10. *Are time limits feasible?* Several comments requested that time limits be set for obtaining search warrants and for Customs processing of mail. Five days was suggested as a reasonable time for obtaining search warrants, while it was suggested that the time period for processing mail be based on the classes of mail examined.

Customs has experimented with setting a specific time limit for obtaining search warrants. In particular, Customs has required other agencies to obtain search warrants with regard to correspondence within 3 working days. This has proved to be too restrictive, especially for the military services. Customs intends to continue to study this matter, but at this time no specific time limit can be identified as satisfactory to all interests. It is for this reason that the term "promptly" has been used in the policy statement.

As to Customs processing of mail, the only delays which occur now are when a seizure or detention is made, when a search warrant is sought, or when the mail is referred to another inspectional agency, such as the Department of Agriculture. Other than in these cases, the mail is processed rapidly and promptly returned to postal channels. At least some of the above-mentioned delays obviously are not within Customs control. For that reason, and because most mail is processed rapidly in any event, a specific time limit is not believed to be feasible. Customs, however, will remain open to such a possibility should unnecessary delays or abuses be found.

11. *Reading correspondence.* Several suggestions urged Customs to emphasize the prohibition against reading correspondence without a search warrant. One suggestion was that the prohibition against reading correspondence in sealed letter class mail found to contain merchandise or contraband, or with a green label or Customs declaration, should be expressed in the regulations.

Section 145.3(c) unqualifiedly prohibits the reading of correspondence in any letter class mail without a search warrant or consent of the sender or addressee. This section clearly encompasses the situations where merchandise or contraband is found in the letter class mail or where a green label or Customs declaration is attached. The regulation, therefore, is considered to be sufficiently explicit in this regard. However, as a further safeguard, the explanatory material in the policy statement has been amended to refer specifically to these two situations.

Another suggestion was that Customs officers and employees should be reminded of the possibility of criminal penalties under 18 U.S.C. 1702 for obstructing correspondence. In response to this suggestion, the policy statement has been amended to remind Customs personnel that any violation of the regulations or policies regarding the examination of letter class mail will lead to administrative sanctions, as well as possible criminal prosecution under 18 U.S.C. 1702.

GENERAL

12. Customs received general recommendations that it remain flexible as to what constitutes reasonable cause, that it pursue the standardization of mail openings and the like, and that alternative privacy safeguards be considered.

The Customs Service is acutely aware of the sanctity of privacy in cor-

respondence. At the same time, Customs must perform its obligations to examine all importations, whether by mail or otherwise. The Customs Service feels that this document balances those interests in a satisfactory manner. Customs will, of course, remain flexible in regard to mail examinations, particularly to the extent that practice indicates the reliability, or lack thereof, of certain facts providing reasonable cause.

In sum, the Customs Service considers the safeguards provided in this document to be adequate to protect the right of privacy. If these safeguards do not in fact prove adequate, Customs will seek alternative measures to minimize the intrusiveness of mail examinations.

OTHER CHANGES

After review of the proposal and consideration of the comments submitted, it was decided that certain other changes to the proposal were needed. The notice proposed to amend only § 145.3 of the Customs Regulations. However, it became apparent that other sections would be affected by such an amendment. Therefore, §§ 145.0 through 145.3 have been amended as appropriate.

Part 145 referred throughout to the term "package" or its equivalent to mean, in effect, any mail article. Because packages can in fact be mailed at the letter rate, or equivalent class or category, this had caused confusion. These amendments therefore replace the term "package" or its equivalent with the term "mail article."

Proposed § 145.3 provided that warrants were required to read correspondence or to open letter class mail unless there was reasonable cause to suspect the presence of merchandise or contraband. That section has been changed to also allow such reading or opening when the sender or addressee gives written authorization to do so. Thus the interested party may be able to expedite the processing of mail by avoiding the delay associated with obtaining a search warrant.

The proposed policy statement has been amended to incorporate the interagency agreement requiring the presence of a Postal Service employee whenever sealed letter class mail is opened.

In addition to the above changes, a number of editorial and stylistic changes have been made to the text of the proposed amendment and policy statement.

DRAFTING INFORMATION

The principal authors of this document are Stuart P. Seidel, Office of the Chief Counsel, and Richard M. Belanger, Office of Regulations and Rulings, U.S. Customs Service. However, other personnel in the Customs Service and in the Department of the Treasury participated in its development.

AMENDMENTS TO THE REGULATIONS

Part 145 of the Customs Regulations (19 CFR Part 145) is amended in the following manner:

1. Section 145.0 is amended by adding the following as the first sentence in that section:

§ 145.0 Scope.

The provisions of this part apply only to mail subject to Customs examination as set forth in § 145.2.

* * * * *

2. Sections 145.1, 145.2, and 145.3 are amended to read as follows:

§ 145.1 Definitions.

(a) *Mail article.* "Mail article" means any posted parcel, packet, package, envelope, letter, aerogramme, box, card, or similar article or container, or any contents thereof, which is transmitted in mail subject to customs examination.

(b) *Letter class mail.* "Letter class mail" means any mail article, including packages, post cards, and aerogrammes, mailed at the letter rate or equivalent class or category of postage.

(c) *Sealed letter class mail.* "Sealed letter class mail" means letter class mail sealed against postal inspection by the sender.

§ 145.2 Mail subject to Customs examination.

(a) *Restrictions.* Customs examination of mail as provided in paragraph (b) is subject to the restrictions and safeguards relating to the opening of letter class mail set forth in § 145.3.

(b) *Generally.* All mail arriving from outside the Customs territory of the United States which is to be delivered within the Customs territory of the United States and all mail arriving from outside the U.S. Virgin Islands which is to be delivered within the U.S. Virgin Islands, is subject to Customs examination, except—

(1) Mail known or believed to contain only official documents addressed to officials of the U.S. Government;

(2) Mail addressed to Ambassadors and Ministers (Chiefs of Diplomatic Missions) of foreign countries; and

(3) Letter class mail known or believed to contain only correspondence or documents addressed to diplomatic missions, consular posts, or the officers thereof, or to international organizations designated by the President as public international organizations pursuant to the International Organizations Act (see § 148.87(b) of this chapter). Mail, other than letter class mail, addressed to the designated international organizations is subject to Customs examination except where the organization certifies under its official seal that the mail contains no dutiable or prohibited articles. Any Customs examination made shall, upon request of the addressee international organization, take place in the presence of an appropriate representative of that organization.

§ 145.3 Opening of letter class mail; reading of correspondence prohibited.

(a) *Matter in addition to correspondence.* Except as provided in paragraph (e), Customs officers and employees may open and examine sealed letter class mail subject to Customs examination which appears to contain matter in addition to, or other than, correspondence, provided they have reasonable cause to suspect the presence of merchandise or contraband.

(b) *Only correspondence.* No Customs officer or employee shall open sealed letter class mail which appears to contain only correspondence unless prior to the opening—

(1) A search warrant authorizing that action has been obtained from an appropriate judge of United States magistrate, or

(2) The sender or the addressee has given written authorization for the opening.

(c) *Reading of correspondence.* No Customs officer or employee shall read, or authorize or allow any other person to read, any correspondence contained in any letter class mail, whether or not sealed, unless prior to the reading—

(1) A search warrant authorizing that action has been obtained from an appropriate judge or United States magistrate, or

(2) The sender or the addressee has given written authorization for the reading.

(d) *Other types of correspondence.* The provisions of paragraph (c) shall also apply to correspondence between school children and correspondence of the blind which are authorized to be mailed at other than the letter rate of postage in international mail.

(e) *Certain Virgin Islands mail.* First class mail originating in the Customs territory of the United States and arriving in the U.S. Virgin Islands, which is to be delivered within the U.S. Virgin Islands, shall not be opened unless—

(1) A search warrant authorizing that action has been obtained from an appropriate judge or United States magistrate, or

(2) The sender or the addressee has been given written authorization for the opening.

§ 145.4 [Amended]

3. Section 145.4 is amended by substituting the term "mail article" for

the term "package from abroad" wherever it appears.

§ 145.40 [Amended]

4. Section 145.40(c) is amended by substituting the term "mail article" for the term "mail package" wherever it appears.

5. Part 145 is further amended by substituting the term "mail article" for the term "package" wherever it appears, and the term "mail articles" for the term "packages" wherever it appears.

(R.S. 251, as amended, R.S. 3061, secs. 498, 499, 581, 624, 46 Stat. 728, as amended, 747, as amended, 759 (19 U.S.C. 66, 482, 1498, 1499, 1581, 1624).)

6. The following policy statement is added at the end of Part 145.

POLICY STATEMENT

EXAMINATION OF SEALED LETTER CLASS MAIL

A. Customs officers and employees shall not open first class mail arriving in the U.S. Virgin Islands for delivery there, if it originated in the Customs territory of the United States, unless a search warrant or written authorization of the sender or addressee is obtained. Customs officers or employees may open and examine all other sealed letter class mail which is subject to the Customs mail regulations (see 19 CFR Part 145) and which appears to contain matter in addition to, or other than, correspondence, provided they have "reasonable cause to suspect" the presence of merchandise or contraband.

B. Customs officers and employees shall not open any sealed letter class mail which appears to contain only correspondence unless a search warrant or written authorization of the sender or addressee is obtained in advance of the opening.

C. Customs officers and employees are prohibited from reading, or authorizing or allowing others to read, any correspondence contained in any letter class mail unless there has been obtained in advance either a search warrant or written authorization of the sender or addressee. This prohibition, which will continue to be strictly enforced, also applies to correspondence between school children and correspondence of the blind which are authorized to be mailed at other than the letter rate of postage in international mail.

D. If a violation of law is discovered upon opening any mail article referred to in paragraph C, and it is believed that the correspondence may provide additional information concerning the violation and is therefore needed for further investigation or use in court, a search warrant shall be obtained before any correspondence is seized, read, or referred to another agency. Search warrants shall be promptly sought. Correspondence may be detained while a search warrant is being sought.

E. If no controlled delivery is arranged and correspondence is not to be otherwise seized pursuant to a search warrant (see "F" below), the item which constitutes the violation shall be removed and any correspondence shall be replaced in the wrapper, or in a new wrapper if the original wrapper has been seized pursuant to 19 U.S.C. 1595a. The wrapper shall then be resealed, marked to indicate it was opened by Customs, and returned to postal channels. Appropriate seizure notices shall be sent in accordance with 19 CFR 145.5(b).

F. No mail article may be referred to another agency without a search warrant unless—

(1) Any correspondence has been removed and the mail article is being referred for examination and clearance under 19 CFR 145.57,

(2) Any correspondence has been removed and the mail article has been lawfully seized by Customs,

(3) The mail article is being referred to Postal Service channels to effect a controlled delivery in cooperation with other law enforcement agencies, or

(4) The mail article is being returned to Postal Service channels for normal processing.

G. Whenever sealed letter class mail is opened, the factors giving the Customs officer or employee "reasonable cause to suspect" the presence of merchandise or contraband shall be recorded on the appropriate form and on the opened envelope or other container by means of appropriate coded symbols. Should a seizure result, these factors shall also be recorded on the seizure report.

H. Sealed letter class mail with the green Customs label on a Customs declaration may be opened without additional cause. Correspondence in such mail is subject to the restrictions regarding the detention, reading, and referral of mail to other agencies found in paragraphs C through F.

I. Whenever any sealed letter class mail is opened for any of the reasons set forth in the above paragraphs, a Postal Service employee shall be present and shall observe the opening.

J. Any violation of the Customs mail regulations or any of these policies will lead to appropriate administrative sanctions, as well as possible criminal prosecution pursuant to 18 U.S.C. 1702.

APPENDIX

A. *Scope.* The Customs Service is authorized to examine, with certain exceptions for diplomatic and governmental mail, all mail arriving from outside the Customs territory of the United States (CTUS) which is to be delivered within the CTUS, and all mail arriving from outside the U.S. Virgin Islands which is to be delivered within the U.S. Virgin Islands. The term "Customs territory of the United States" is limited to the States, the District of Columbia, and Puerto Rico. Consequently, mail arriving from other U.S. territories and possessions is subject to Customs examination even though it is designated "domestic" mail for Postal Service purposes. Likewise, mail in the APO/FPO military postal system is subject to Customs examination, even though it also is designated "domestic" mail for Postal Service purposes. The Customs Service therefor is responsible for examining all international mail to be delivered in the CTUS and certain limited categories of so-called "domestic mail".

B. *Definitions.* Under various international conventions and bilateral agreements, international mail falls within two main classes, Parcel Post and Postal Union mail.

Parcel Post is not permitted to contain correspondence but is to be used for the transmission of merchandise and is fully subject to Customs examination in the same manner as other merchandise shipments (e.g., luggage, cargo, containers, etc.). Postal Union mail is divided into "LC" mail (Lettres et Cartes) and "AO" mail (Autres Objets).

"LC" mail consists of letters, packages paid at the letter rate of postage, post cards, and aerogrammes. The term "letter class mail" as used in the Customs Regulations and in this policy statement means "LC" mail as well as equivalent articles in "domestic" mail subject to Customs examination. Equivalent articles in "domestic" mail would include articles mailed at the letter rate, or equivalent class or category, in the APO/FPO military system or from a U.S. territory or possession outside the CTUS. Since the term "letter class mail" thus includes packages and bulky envelopes as long as they are mailed at the letter rate, or equivalent class or category, the restrictions relating to opening and reading of correspondence apply equally to such packages or bulky envelopes.

"AO" mail is to be treated in the same manner as Parcel Post mail since the Universal Postal Union Convention requires that they "be made up in such a manner that they may be easily examined" and generally are not permitted to "contain any document having the character of current and personal correspondence." Exceptions to the latter requirement exist for matter for the blind and certain correspondence between school children. Because of these exceptions, the prohibition against reading correspondence without a search warrant or authorization of the sender or addressee applies to correspondence of the blind and correspondence between school children contained in "AO" mail. "AO" mail can usually be identified by the following words: "Imprime" or "Printed Matter", "Cecogramme" or "Literature for the Blind", "Petit Paquet" or "Small Packet" or similar terms or their equivalents.

c. Reasonable Cause to Suspect. Determining whether there is "reasonable cause to suspect" that merchandise or contraband is contained in sealed letter class mail is ultimately a matter of judgment for each Customs official, based on all relevant facts and circumstances. This judgment should be exercised within the framework of the Customs regulation that sealed letter class mail which appears to contain only correspondence is not to be opened unless a search warrant or written authorization from either the sender or the addressee has been obtained in advance of the opening.

Past practice indicates that the following circumstances (which are illustrative and not exhaustive) provide "reasonable cause to suspect" and permit the opening of sealed letter class mail without a search warrant or authorization of the sender or addressee.

1. A detector dog has alerted to the presence of narcotics or explosives in a specific mail article.

2. X-ray or fluoroscope examination indicates the presence of merchandise or contraband.

3. The weight, shape, feel, or sound of the mail article or its contents may indicate that merchandise or contraband (e.g., a hard object which may be jewelry, a stack of paper which may be counterfeit money, or coins) could be in the mail article. Contents of a mail article which feel lumpy, powdery, or spongy may, for example, indicate the presence of narcotics.

4. Information from a source previously shown to be reliable indicates that an identifiable mail article contains merchandise or contraband.

5. The mail article is insured.
6. The mail article is a box, carton, or wrapper other than a thin envelope.
7. The sender or addressee of the mail article is known to be fictitious.

On the other hand, certain facts standing alone generally will not provide "reasonable cause to suspect" the presence of merchandise or contraband and therefore do not permit the opening of sealed letter class mail. For example, sealed letter class mail may not be opened merely because:

1. The mail article is registered.
2. The feel of a letter-size envelope suggests that it contains one or a limited number of photographs.
3. The mail article appears to be part of a mass mailing.
4. The mail article is from a particular country, whether or not a known source country of contraband.
5. A detector dog has alerted to the presence of narcotics or explosives somewhere within a tray of mail (the individual articles of mail must then be examined individually).
6. The sender or addressee of the mail article is known to have mailed or received contraband or merchandise in violation of law in the past.
7. The wrapper contains writing or typing similar to that previously found on articles of mail which contained contraband or merchandise in violation of law.

In cases where any one of the above facts is present, additional evidence must exist which in conjunction with that fact provides reasonable cause to suspect the presence of merchandise or contraband.

R. E. CHASEN,
Commissioner of Customs.

Approved: March 20, 1978.

BETTE B. ANDERSON,
Under Secretary of the Treasury.

[FR Doc. 78-9125 Filed 4-3-78; 8:45 am]

14308

RULES AND REGULATIONS

[7710-12]

Title 39—Postal Service

CHAPTER I—U.S. POSTAL SERVICE

PART 111—GENERAL INFORMATION ON POSTAL SERVICE

Mail Security Regulations

AGENCY: U.S. Postal Service.

ACTION: Final rule.

SUMMARY: These regulations, which are a revision of proposed regulations published in the FEDERAL REGISTER on April 8, 1977, 42 FR 18,754-18,758, prescribe Postal Service policy as to when it is permissible to delay, detain, or open mail, and establish procedures for handling requests from Government agencies to delay, detain, or open mail. Generally, the regulations do not significantly change the provisions of the proposal, except that provisions have been added to protect the privacy of certain correspondence permitted to be sent as unsealed mail (such as the correspondence sent by the blind in braille), and a new provision has been added which would explicitly reflect the authority of prison, jail, and correctional institution personnel to open, examine, and censor mail addressed to inmates who consent to receive their mail at the institution through the institutional authorities.

EFFECTIVE DATE: May 5, 1978.

ADDRESS: Comments on these regulations are welcome and will be considered with a view towards making changes in the regulations in the future. Written comments should be directed to Assistant General Counsel, Special Projects, U.S. Postal Service, 475 L'Enfant Plaza West, SW., Washington, D.C. 20260. Copies of all written comments received are available for public inspection and photocopying between 9 a.m. and 4 p.m., Monday through Friday, outside Room 9000.

FOR FURTHER INFORMATION CONTACT:

Charles R. Braun 202-245-4620 or William T. Alvis 202-245-4630.

SUPPLEMENTARY INFORMATION: On April 8, 1977, the Postal Service published in the FEDERAL REGISTER, 42 FR 18,754-18,758, a notice of proposed rulemaking on mail security. On the basis of the comments it received, its own further mail security experience, and further internal consideration of the proposed regulations, the Postal Service has decided to adopt its proposed regulations with only slight modifications. Because of the importance of adopting regulations of this kind, and the Postal Service's judgment that major changes in its proposal are not warranted, the Postal Service has decided to promulgate the revised regulations as a final rule. A discussion of the general basis and purpose of these regulations accompanied the proposal published last year. 42 FR 18,754-18,756. The Postal Service here explains its reasons for adopting changes in the proposal. The Postal Service also invites further comments on the regulations which anyone wishes to submit. There is no time limit for submitting such comments, and any comments submitted will be considered with a view toward making amendments of these regulations in the future.

The subdivisions of these regulations generally concern the same subject matters as the subdivisions of the proposal. There have been added a new provision (115.24) on the correspondence of handicapped persons and school children permitted in unsealed mail, and a new provision (115.97) on prisoner mail. Changes have been made in proposed 115.91 and 115.92(a), concerning customs clearance and plant quarantine inspections of mail entering the Customs Territory of the United States. Clarifying changes have been added to proposed 115.21, concerning the privacy of the contents of sealed mail; proposed 115.231 and 115.232, defining sealed and unsealed mail; and proposed 115.62 and 115.63, concerning search warrant execution procedures. We anticipate that the proposed changes in 331, 42 FR 18,758, will be adopted without change.[1]

[1] No comments were received on proposed 331, Amendments of Chapter 3 of the Postal Service Manual such as 331, since they generally consist of internal operational instructions to postal employees, are not promulgated in the FEDERAL REGISTER. The text of proposed 331 follows:

"331.11 Requests for Surrender of Mail.

"Any employee served with legal process, other than a search warrant issued under Rule 41 of the Federal Rules of Criminal Procedure (see section 115.6), purporting to require the surrender of mail, shall respectfully refuse to surrender it and shall refer the matter to the Regional Counsel for further information.

"See 115.31 for permissible detention of the mail.

"331.12 Access to Mail and Mail Handling Areas.

"Access to mail and mail handling areas in postal installations is restricted to authorized postal employees and mail contractors on official business, and to other persons specifically permitted access by the installation head or superior authority for the proper conduct of the official business of the Postal Service, the General Accounting Office, or a congressional committee. Such other persons must be accompanied by a postal employee on duty. Federal, State, or local law enforcement or public safety authorities may be given access to mail and to mail handling areas to remove potentially dangerous mail matter in accordance with section 115.4. In appropriate circumstances, the installation head may allow Federal, State, or local law enforcement authorities

There follows a detailed discussion of the changes that have been adopted.

Privacy of Personal Correspondence of Handicapped Persons and School Children Permitted in Unsealed Mail. The proposal did not offer any protection of the privacy of certain personal correspondence which is permitted to be sent as unsealed mail. Although normally personal correspondence is required to be sent as sealed mail, the blind and certain other handicapped persons are permitted to send their personal correspondence and certain other materials in the form of raised or special characters or sound recordings as unsealed mail free of domestic postage and at reduced international rates of postage. 39 U.S.C. 3404 (1970); Universal Postal Convention, arts. 18-19; Detailed Regulations, art. 128; Lausanne, 1974, T.I.A.S. No. 8231. While the law and the postal convention expressly provide that such mail is to be "unsealed", see section 3404 and article 128; a postal inspection may readily be conducted by opening such mail and inspecting the materials inside to make sure that they are eligible for the special or free rate of postage claimed by the sender, without invading the privacy of any personal correspondence found inside by disclosing the contents of personal messages. Similar considerations apply to certain personal correspondence between school children permitted at the international printed matter rate. The regulations therefore contain a new 115.24 explicitly stating that the contents of such personal correspondence permitted to be enclosed in such unsealed mail shall not be divulged except with the consent of the addressee or sender or to a person executing a valid search warrant. A conforming change is made in 115.91, on customs clearance of mail.

Prison openings of mail addressed to inmates. The proposal contained no provision which would expressly permit, and therefore would arguably have prohibited, the opening and inspection of mail addressed to persons confined in prisons, jails, or other correctional institutions. It was therefore suggested that a provision which recognized the long-standing practice of prisons, jails, and other correctional institutions of censoring mail entering prisons and other places of confinement should be included in the regulations. It was also suggested that such a provision would, in addition, clarify the duties and responsibilities of prison officials in handling prisoner mail and the limitations on their authority to detain, open, or return mail addressed to prisoners.

Since prison censorship of inmate mail entering the prison is lawfully conducted with the consent of the inmate-addressee, an explicit exception for such censorship did not appear to be absolutely necessary. However, so as to avoid unnecessary disputes as to whether postal regulations prohibit such censorship, the regulations include a new provision, 115.97, which would explicitly permit jail, prison, or other correctional institution officials, within the limits of the law, to open, inspect, and censor incoming mail addressed to inmates to the extent that the inmates consent to receive their mail at the prison through the prison authorities. The implied exemption for such prison mail censorship from the literal requirements of 18 U.S.C. 1701-1703 is generally well-established, at least where the inmate consents to receive his mail at the prison through the prison authorities. *Procunier v. Martinez*, 416 U.S. 398 (1974); 1 Op. Solic. P.O. Dep't No. 289 at 719 (1882); 9 Op. Solic. P.O. Dep't No. 811 at 240 (1949). The permissible scope of such prison censorship, however, has been a matter of controversy. Section 115.97 would prescribe an appropriate exception only for such prison mail censorship as may be authorized and lawful. Section 115.97 would prescribe the minimum safeguards necessary to protect the uncontroverted rights of prisoners regarding correspondence addressed to them through the U.S. mails, and of the persons addressing mail to them through the mails.

The regulations, however, do not attempt to clarify all unresolved and controversial issues in this area. There are many State, Federal, and military places of confinement, operating under different authorities and facing different prison security conditions. It has not been shown that there is a strong need for uniform, nationwide rules on all details of prisoner mail rights that overrides the interests of the various prison authorities in having latitude to provide for the security of prisons. Moreover, the Postal Service's authority is limited by law to matter originating in the U.S. mail system; it does not extend to prisoner-originated "mail" before the prison authorities permit it to be deposited in the U.S. mails. Many of the details of prison mail censorship may best be left to the appropriate prison authorities, Congress and the State legislatures, and the State and Federal courts.

Customs clearance of incoming mail. The proposal would have permitted designated personnel of the U.S. Customs Service, without a search warrant but upon reasonable suspicion, to open and inspect the contents of mail originating outside the Customs Territory of the United States ("CTUS") and addressed for delivery inside the CTUS, except sealed mail addressed for delivery in the District of Columbia. The proposal would have prohibited Customs officials from reading correspondence in sealed mail without a search warrant. Several comments received by the Postal Service objected that the customs opening of mail without a search warrant was an unjustified invasion of privacy, and that a search warrant should be required on grounds of constitutional law and for policy reasons. Other comments expressed approval of such customs mail openings as may appear necessary for the enforcement of import prohibitions, but stressed that the privacy of correspondence should be protected.

After the publication of the proposal, the United States Supreme Court, reversing a decision of the United States Court of Appeals for the District of Columbia Circuit, held that evidence obtained when Customs Service personnel opened and inspected the contents of sealed letter mail from Thailand, without a search warrant, was admissible, when the opening was authorized by joint postal-customs regulations, the customs inspector had reasonable cause to suspect that the mail contained dutiable or prohibited items, and the reading of the correspondence inside without a warrant was prohibited. The Court concluded that such openings and inspections of such sealed letter mail were authorized by law and were not unconstitutional. *United States v. Ramsey*, 431 U.S. 606 (1977). The Court emphasized that its opinion did not express an opinion on the constitutionality or legality of reading correspondence without a search warrant.

We believe that so long as the privacy of correspondence is protected, some program of providing for customs clearance of incoming mail should be continued. The incoming letter mails may contain not only correspondence but merchandise as well. In recognition of the varied nature of the contents of letter mail, the Universal Postal Convention, which generally regulates the exchange of international letter post items, specifically authorizes each postal administration acting in accordance with its domestic law to open letter post items for customs clearance. Universal Postal Convention, art. 34; Detailed Regulations, Art. 118; Lausanne, 1974, T.I.A.S. No. 8231. Although the Postal Service in accordance with domestic law does not permit its employees to open sealed letter mail without either consent or a search warrant, *Ex parte Jackson*, 96 U.S. 727, 733 (1877) (dictum), *United States v. Van Leeuwen*, 397 U.S. 249 (1970), 18 U.S.C. 1702, 1703(a) (1976), the Postal Service believes that it would be inconsistent with the laws regulating and taxing imports for the Postal Service not to cooperate with the Customs Service in any fashion

access to mail and mail handling areas, to deal with conditions dangerous to life, limb, or property, such as fires or flooding, or to make lawful arrests."

and thus establish the international mails as a secure means of bringing dutiable merchandise and prohibited items into the United States, without observing the customs requirements of U.S. laws. In view of the *Ramsey* case, the constitutionality and legality of the proposed cooperation are not in doubt.

After the *Ramsey* case was decided, a bill was introduced in Congress to require a search warrant for customs openings of sealed letters, and oversight hearings were begun by the Subcommittee on Information and Privacy of the House Government Operations Committee concerning the question of whether to require a search warrant. A preliminary report has been issued by the Committee, "Investigation of Mail Opening by the Customs Service," H.R. Rep. No. 95-794, 95th Cong., 1st Sess. (1977). The Postal and Customs Services, moreover, are now conducting their own review of the customs mail program to determine how the administration of the program may be improved. The search warrant question, since it involves a balancing of the people's right to privacy and their right to effective law enforcement, seems best left to Congress to resolve. In the interim the Postal Service has decided not to adopt substantial changes in the customs clearance provisions of these regulations.

The regulations would therefore permit designated U.S. Customs personnel to continue to open and inspect the contents of mail originating outside the CTUS and addressed for delivery inside the CTUS without a search warrant upon reasonable cause to suspect that the mail contains dutiable or prohibited items. The prohibition against reading correspondence would be continued, supplemented by a prohibition against the disclosure of the contents of the correspondence of school children and of the blind and other handicapped persons which may properly be sent in unsealed mail at reduced rates of postage. The proposed prohibition against the opening of sealed mail addressed for delivery in the District of Columbia, without a search warrant, which had reflected a joint interim decision by the Postal and Customs Services to honor the D.C. appellate court's decision in *Ramsey* as to D.C.-addressed mail while it reflected the law of the D.C. Circuit, is not adopted in view of the Supreme Court's reversal of the D.C. court's decision. The proposal has been revised to substitute the words, "reasonable cause to suspect that the mail contains dutiable or prohibited items," for the words, "reasonable suspicion", so as to conform the language of the regulations to that used by the Supreme Court and the statute upon which the Court relied in the *Ramsey* case.

The Customs Service suggested that there should be a provision in postal regulations which would authorize Customs Service personnel to open mail originating outside the Virgin Islands and addressed for delivery inside the Virgin Islands, on the basis of certain U.S. territorial laws, 48 U.S.C. 1395 and 1408i (1970), under which the Customs Service has been assigned certain responsibility for enforcing the customs laws of the Virgin Islands. These provisions do not, however, mention the mails. Thereafter, the Customs Service proposed to amend its own regulations to authorize the opening and inspection of all mail entering the Customs district of the Virgin Islands. 42 FR 38393-38394. The statutory authorization for the Customs Service to open envelopes without a search warrant (19 U.S.C. 482), however, appears to be limited to searches for articles unlawfully "introduced into the United States * * *", and the other statutory provision relieving the Customs Service of the search warrant requirement applies only to sealed letter mail which is not "of domestic origin * * *." 39 U.S.C. 3623(d) (1970). Neither the Customs Service's letter nor its subsequent regulatory proposal discussed either of these statutory provisions, even though they appear to cast doubt on whether the Customs Service's suggestion can be adopted as to sealed letter mail of domestic origin. The Postal Service therefore adopts only so much of this suggestion as concerns unsealed mail and sealed mail originating outside CTUS and addressed for delivery within the Customs district of the Virgin Islands. The regulations would authorize customs examination of sealed mail of domestic origin entering the Customs district of the Virgin Islands on the condition that such mail will not be opened without a search warrant or the consent of the sender or addressee.

Department of Agriculture mail openings of foreign origin mail. One comment objected to the provision of the proposal which would authorize Department of Agriculture personnel to open, for plant quarantine purposes, sealed mail originating outside the Customs Territory of the United States and addressed for delivery inside the Customs Territory of the United States, without the "reasonable suspicion" requirement applicable to the Customs Service. Such openings by Department of Agriculture personnel, however, are authorized by the sender of the mail who affixes to the article a green and yellow or red and white address label which indicates that the mail contains matter subject to plant and animal quarantine, and which bears the address of a Department of Agriculture inspection station. Section 115.92(a) is therefore amended to reflect the consensual nature of these Department of Agriculture inspections, by inserting the words, "but with the written consent of the sender * * *." This amendment is not intended to prevent the plant or animal quarantine personnel of the Agriculture Department from continuing to cooperate lawfully with customs personnel as to particular plant or animal matter found by customs personnel under section 115.91 and believed to be subject to quarantine or prohibited entry under any laws primarily administered by the Agriculture Department. See 19 CFR 12.10–12.24 (1977).

State search warrants. The proposal prohibited the honoring of State search warrants for mail. Proposed 115.61, 42 FR 18757. Although all State governments were notified of this provision, only eight States commented on the proposal, and five of these States either expressed the belief that the proposal would not have any impact on State investigations or expressed no objection to the proposal insofar as State warrants were concerned. Three State comments objected to the State warrant provision, generally emphasizing the circumstances where there would be no concurrent Federal jurisdiction for obtaining a Federal search warrant to assist a State investigation.

Section 3623(d) of title 39, United States Code, permits sealed mail to be opened pursuant to a "search warrant authorized by law." The preamble of the proposal pointed out that the legislative history of section 3623(d) and its predecessors shows that the search warrants to which the section refers are Federal search warrants only, and that there appears to be no legal basis for the Postal Service to permit the execution of non-Federal search warrants. 42 FR 18758 (1977) (section encaptioned, "(c) *Search warrants.*").

As a practical matter, in most cases of concern to State authorities, the Federal mailability statutes would provide a clear legal basis for concurrent Federal jurisdiction, and a plainly authorized Federal search warrant could be obtained through Federal cooperation with the State investigation. Moreover, in many cases where State courts might issue search warrants, the honoring of such warrants for mail might be improper, if not unlawful: for example, a State warrant for mail which was mailable and required to be transmitted and delivered under Federal law, but deemed obscene under the law of a State.

A compromise suggestion was that State warrants be permitted where they did "not impinge on the necessary functions of the Postal Service."

Our view, however, that the Postal Service has no legal authority to permit the execution of any State search warrants, together with the

large number of States (all but three) which expressed no opposition to the proposal, are persuasive that section 115.61 should be adopted without change.

Military investigations. The proposal would have prohibited military commanders from authorizing the opening of mail, but the supplementary information section noted that, "* * * certain subordinate military components of the Department of Defense have held the view that a search authorization issued by a military commander should be regarded as the military equivalent of a civilian search warrant and should therefore be sufficient to authorize the opening and seizure of mail in military postal custody, at least when the mail comes into the possession of a unit mail clerk." 42 FR at 18755. However, the Department of Defense did not object to the proposal insofar as it prohibited military commanders from authorizing searches of mail.

Records of mail openings. One suggestion was that the Postal Service should maintain a record of all mail that is opened before it is delivered to the addressee and that the records so kept be open to public inspection. The proposal would have required the making and retention of records only for mail suspected of being dangerous to life, limb, or property opened without a search warrant, and mail opened pursuant to a search warrant. Except for the additional search warrant record requirements discussed below, the regulations add no additional record-keeping requirements.

The making and maintaining of records of mail openings would be costly. The vast majority of authorized mail openings are routine openings in well-defined circumstances that do not threaten the legitimate expections of privacy of postal customers, such as an opening of unsealed mail for a postal inspection to determine whether proper postage has been paid, or a dead mail opening solely to determine an address at which the mail can be delivered. In the case of mail openings conducted for the limited purpose of protection postal revenues, such as postal inspections to determine whether proper postage has been paid, costly enforcement procedures could be self-defeating. In the case of openings under which the privacy of correspondence is otherwise protected, such as dead mail openings, record-keeping requirements would unnecessarily drive up the cost of providing postal services.

The question of whether some degree of additional record-keeping may be appropriate in connection with the opening of mail by the Customs Service is now receiving consideration within the Customs Service, and the House Committee on Government Operations has recommended certain temporary record-keeping to provide information relevant to its consideration of whether to recommend legislation requiring a search warrant or consent for Customs openings of mail which is sealed against postal inspection. H.R. Rep. No. 95-794, 95th Cong., 1st Sess. 7-10 (1977). The Postal Service does not now adopt any additional permanent record-keeping requirements for customs clearance of mail.

Definitions of sealed and unsealed mail. Several clarifying changes are adopted in the definitions of sealed and unsealed mail.

A new sentence has been added which prescribes, as to any mail item permitted under postal regulations to consist of both sealed and unsealed mail (such as a letter and parcel of merchandise sent as one item), that the sealed component of the item shall be treated as sealed mail for privacy purposes but as unsealed mail for mail handling purposes (115.231, last sentence). This expresses present policy. The proposal had not been intended to change policy in this regard, but was silent on this question.

Two further changes revise the definitions of sealed and unsealed mail to delete any reference to the priority of the mail's handling, transportation, and delivery, and to distinguish that mail on which appropriate letter class postage is paid and which thus is contained in one of the classes of mail maintained by the Postal Service for letters sealed against inspection, from other mail. The regulatory language is borrowed in part from 39 U.S.C. 3623(d) (1970). It is intended to show that the class of mail for which postage is paid (rather than the fees for special services) determines whether the mail is to be considered to be sealed against postal inspection. Thus, a fourth-class special handling parcel would be considered under part 115 to be unsealed mail for privacy purposes on account of the fourth-class postage, notwithstanding that such a parcel is entitled to preferred mail handling under postal regulations on account of the special service fee for special handling (115.231, 115.232). The revision also anticipates the possibility of the adoption of a "citizen's rate" for first-class mail service. Such service would be sealed against inspection and would receive the most expeditious handling and transportation, but non-citizen's rate first-class mail would receive priority over citizen's rate first-class mail in delivery.

The proposed reference to Electronic Ticket Delivery Mail has been deleted from the list of classes of mail sealed against inspection (115.231). This had been included in the proposal in anticipation of a six-month test of such a service, and is deleted from the final rule in view of the recent completion of the test and consequent termination of the service.

Search warrant execution procedures. Section 115.62, concerning search warrant execution procedures, has been revised to add the requirement that the head of the postal installation at which the warrant is executed, or his designee, shall furnish a report of the seizure to the addressee's post office of any domestic mail seizures, and the appropriate international claims office of any international mail seizures. Proposed 115.62 had only required the installation head or his designee to furnish a copy of the search warrant to the Postal Inspection Service. The purposes of these additional requirements are to make sure that the Postal Service fulfills its postal treaty obligations to notify the foreign postal administration in whose service any seized item originated of the seizure of the item, Universal Postal Convention, Lausanne, 1974, T.I.A.S. No. 8231, art. 33, sec. 5; to make sure that any inquiry by an addressee about an undelivered item is promptly and accurately answered; and to preclude the unnecessary payment of invalid insurance or indemnity claims for failure to deliver insured or registered items seized under a warrant. An addressee might unwittingly present such a claim and the claims office might unwittingly honor it if either lacked knowledge of the seizure pursuant to the warrant.

Section 115.63, concerning notice to the sender of seizure of return receipt requested mail pursuant to a search warrant, reflects two revisions of 115.63 as proposed. First, the procedure of returning endorsed return receipts to inform the sender of the seizure has been confined to domestic mail, to reflect the fact that mail seizure notices for international mail are required to be dispatched to the foreign postal administration in whose service the seized item originated, e.g., Universal Postal Convention, Lausanne, 1974, T.I.A.S. No. 8231, art. 33, sec. 6, and no procedure is authorized for the destination postal administration in whose service the item was seized to notify the foreign sender directly of the seizure. (The origin administration ordinarily advises its customer of the seizure, after it is informed of the seizure by the destination administration, although the origin administration is not required by international law to notify its customer except in response to a formal inquiry by the addressee.) Second, the references to "notice of nondelivery" in the context of "a return receipt or notice of nondelivery" have been deleted as unnecessary, since the function of notifying the sender of domestic return receipt requested mail of its nondelivery is performed by an endorsement on the return receipt or on

the undelivered mail rather than by a special notice of nondelivery.

Other recommendations. Several recommendations were received from certain officials in five federal executive departments which the Postal Service decided not to adopt on legal grounds. Since a statement summarizing these proposals and explaining the reasons for not adopting them would have been lengthy, and the public comments did not put forward similar proposals, the Postal Service has decided to write to each of these officials to explain in detail why his proposal was not adopted, rather than to publish a detailed statement of explanation in the FEDERAL REGISTER. Copies of these letters will be available for public inspection and photocopying between 9 a.m. and 4 p.m., Monday through Friday, outside room 9000, 475 L'Enfant Plaza West SW., Washington, D.C. 20260.

In view of the considerations discussed above, the Postal Service revises its proposal and adopts the following revision of the Postal Service Manual:

I. Part 115 of the Postal Service Manual is revised to read as follows:

PART 115. MAIL SECURITY

115.1 Importance of mail security.

The Postal Service must preserve and protect the security of all mail in its custody from unauthorized opening, inspection, or reading of contents or covers, tampering, delay, or other unauthorized acts. Any postal employee committing or allowing any of these unauthorized acts is subject to administrative discipline, or criminal prosecution leading to fine, imprisonment, or both. An employee having a question about proper mail security procedures, which is not clearly and specifically answered by postal regulations or by written direction of the Inspection Service or Law Department, shall resolve the question by protecting the mail in all respects and moving it, or letting it move, without interruption to its destination.

115.2 Opening, reading, and searching of sealed mail generally prohibited.

.21 In general, no person may open, read, search, or divulge the contents of mail sealed against inspection, even though such mail may be believed to contain criminal or otherwise nonmailable matter or evidence of the commission of a crime. The only exceptions to this general rule are: (a) a postal employee in a dead mail office acting in accordance with dead mail regulations, part 159; (b) a postal employee acting with the consent of the addressee or sender; (c) a person executing a search warrant in accordance with section 115.4; or (e) an authorized Customs or Agriculture employee, acting in accordance with sections 115.91 or 115.92.

.22 Mail not sealed against inspection.

Mail not sealed against inspection may be opened, surrendered, its contents inspected and read, or information concerning it released, by an authorized postal employee, only: (a) under a search warrant in accordance with section 115.6; (b) without a search warrant in order to determine the mailability of the contents or whether the correct postage has been paid; or (c) as otherwise expressly permitted by postal regulations.

.23 Definitions.

.231 *Mail sealed against inspection.* For purposes of this part, the terms, "mail sealed against inspection", or "sealed mail", mean mail on which appropriate postage is paid, and which under postal laws and regulations is included within a class of mail maintained by the Postal Service for the transmission of letters sealed against inspection. The terms do not include international transit mail (section 115.8). They include first class mail, Express Mail, international letter mail ("LC Postal Union mail" as defined in USPS Publication 42, International Mail), and Mailgram. When sealed mail is properly inserted inside unsealed mail or attached to it in accordance with postal regulations, the sealed mail component of the combination item shall be treated as sealed mail under this part, except 115.3.

.232 *Mail not sealed against inspection.* For purposes of this part, the terms, "mail not sealed against inspection", or "unsealed mail", mean mail on which appropriate postage for sealed mail has not been paid, and which under postal laws or regulations is not included within a class of mail maintained by the Postal Service for the transmission of letters sealed against inspection. The terms do not include international transit mail (section 115.8). They include second, third, and fourth class mail, international parcel post mail, and "AO Postal Union Mail" (as defined in USPS Publication 42, International Mail).

.24 Correspondence permitted to be enclosed in unsealed mail.

The contents of correspondence permitted to be sent by the blind in special or raised characters or in the form of sound recordings and by school children at the international printed matter rate shall not be divulged except to a postal employee acting with the consent of the addressee or sender or person executing a search warrant in accordance with section 115.6.

115.3 Permissible detention of mail.

.31 Sealed mail generally not detained.

No postal employee may detain mail sealed against inspection (other than dead mail) except: (a) a postal inspector acting diligently and without avoidable delay upon reasonable suspicion, for a brief period of time, to assemble evidence sufficient to satisfy the probable cause requirement for a search warrant in accordance with section 115.6, and to apply for, obtain, and execute the warrant; (b) a postal employee acting in strict accordance with postal regulations (for example, sections 115.4 or 154.145); (c) a postal employee acting under postal regulations with the express consent of the addressee or sender (for example, section 153.5 or 154.19); (d) a postal employee acting under an order issued under 39 U.S.C. 3005, relating to false representations, lotteries, and unlawful matter; (e) a postal employee acting under section 115.62; (f) a postal employee conducting a mail count by direction of his postmaster or a postal inspector; (g) a postal employee acting under an order of a Federal court; or, (h) a postal employee during the period required to seek and obtain instructions under section 154.7 concerning mail whose delivery is in dispute, or under section 331.1 concerning legal process other than a search warrant duly issued under Rule 41 of the Federal Rules of Criminal Procedure, purporting to require the surrender of mail matter.

.32 Unsealed mail.

Mail not sealed against inspection may be delayed or detained for the reasons stated in section 115.31 and as otherwise expressly permitted by postal regulations.

115.4 Mail reasonably suspected of being dangerous to persons or property.

Mail, sealed or unsealed, reasonably suspected of posing an immediate danger to life or limb, or an immediate and substantial danger to property, may, without a search warrant, be detained, opened, removed from postal custody, and processed or treated, but only to the extent necessary to determine and eliminate the danger, and only if a complete written and sworn statement of the detention, opening, removal, or treatment, and the circumstances that prompted it signed by the person purporting to act under this subsection, is promptly forwarded to the Chief Inspector. Any person purporting to act under this subsection who does not report his action in accordance with the requirements of this subsection to the Chief Inspector, or whose action is determined after investigation not to have been authorized, is subject to disciplinary action or criminal prosecution or both.

115.5 Disclosure of information about mail sent or received by particular senders or addressees.

Except as provided in 115.5 (a)-(f), no employee shall disclose: information on the outside cover of any piece of mail; information obtained from any inspection of the contents of mail; or any other information which concerns any mail sent or received by any particular sender, addressee, or group of senders or addressees, which the employee obtains or controls in the performance of his official duties. An employee may disclose such information:

(a) to the Postal Inspection Service for its official use, including appropriate reference to law enforcement authorities, when there is a reasonable basis to suspect that such information is evidence of the commission of a crime under State or Federal law, except that information obtained by opening sealed mail in a dead letter office may be used only to determine an address at which the mail can be delivered;

(b) under section 233.2, regarding mail covers;

(c) under a search warrant in accordance with section 115.6;

(d) under an order of a Federal court;

(e) at the request of the sender or addressee or the authorized agent of either; or,

(f) otherwise in accordance with postal regulations, *provided that* any such information obtained from an inspection of the contents of mail may only be disclosed if the inspection accords with the regulations contained in this Part.

115.6 Execution of search warrants.

.61 Warrant issued by Federal court or served by Federal officer.

A search warrant duly issued under Rule 41 of the Federal Rules of Criminal Procedure shall be executed as provided in section 115.62. Usually, a warrant issued by a Federal court or served by a Federal officer is issued under Rule 41, and is "duly issued" if signed and dated within the past ten days. No employee shall permit the execution of a search warrant issued by a State court and served by a State officer. If in doubt, an employee should temporarily detain the mail in question and promptly call a postal inspector for guidance.

.62 Search warrant execution procedures.

A postal inspector may execute a search warrant. A person other than a postal inspector executing a search warrant must be accompanied by a postal employee authorized by the head of the postal installation at which the warrant is to be executed. Mail may be taken from postal custody under the authority of a search warrant only if the person executing the warrant leaves a copy of the warrant and a receipt or inventory, made out in the presence of the postal employee accompanying him, which particularly describes each piece of mail taken, including all service endorsements on the cover (such as, "Return Receipt Requested") and any official postal identity numbers (such as registry, insurance, or certified mail numbers). The receipt or inventory may be attached to the copy of the warrant, or written on the reverse side of the copy of the warrant. The installation head or his designee shall make a copy of the receipt or inventory and of the copy of the warrant and send it to the Inspector-in-Charge of the Division in which the installation is located. The installation head or his designee shall also furnish a report of the seizure of any domestic mail to the addressee's post office and of any seized international mail to the appropriate international claims office.

.63 Notice to sender or addressee.

If the cover of domestic mail has been endorsed and stamped to show that the sender has requested and paid for a return receipt, the sender shall be notified of the seizure of the mail under the warrant by an endorsement to that effect on the return receipt, or on a duplicate if the original receipt is taken. The receipt shall be dispatched as soon as possible, unless the officer executing the warrant presents a Federal court order to delay the dispatch. In that event the dispatch shall be delayed in accordance with the order.

115.7 Cooperation with Federal and State and local agencies for access to mail.

A postal employee receiving a request from a Federal, State, or local law enforcement, intelligence, or other government agency, for access to, or information about, particular mail matter of any class in the custody of the Postal Service shall refer the request to the Postal Inspection Service, with the explanation that the Inspection Service is responsible for liaison with all government agencies with respect to a request of this kind. No employee of the Inspection Service shall comply with such a request, except as authorized by postal regulations.

115.8 International transit mail.

.81 Definitions

.811 *International transit mail.* As used in this part, the term "international transit mail" applies to mail of foreign origin which is passed by a foreign postal administration to the United States Postal Service for forwarding to a foreign postal administraiton under a postal treaty or convention. It includes closed mails and à découvert letter post items.

.812 *Closed mail.* The term "closed mail" refers to any bag, container, or mail passed to the United States Postal Service by a foreign postal administration, the entire contents of which are required by applicable postal treaties or conventions to be passed to a foreign postal administration

.813 *À découvert letter post item.* The term "à découvert letter post item" refers to any international letter post item ("Postal Union mail" as defined by USPS Publication 42, International Mail) which is addressed for delivery by a foreign postal administration, and is passed to the United States Postal Service by a foreign postal administration in a bag, container, or mail that must be opened by the United State Postal Service is accordance with applicable postal treaties or conventions because it also contains items addressed for delivery by the United States Postal Service.

.82 Special security rules.

International transit mail is entitled to freedom of transit. It shall not be opened, seized, or searched. It is not subject to Customs or Agriculture inspection under section 115.91 or 115.92. In accordance with the Universal Postal Convention, any international transit mail consisting of closed mails, à découvert letter-post items and air mail correspondence, shall not be detained, but shall instead be forwarded to the next foreign postal administration by the quickest routes which the United States Postal Service uses for mail sealed against inspection.

115.9 Mail security, law enforcement and other Government agencies.

.91 Customs service.

Without a search warrant but upon reasonable cause to suspect that the mail contains dutiable or prohibited items, designated personnel of the U.S. Customs Service may open or inspect the contents of mail in the customs inspection of mail (including APO-FPO mail) which has originated outside the Customs Territory of the United States ("CTUS") and is addressed for delivery either inside the CTUS or inside the Customs district of the Virgin Islands, on the following terms and conditions.

(a) *Other regulations.* Such inspections may be conducted only in accordance with part 320, USPS Publication 42, International Mail, relating to cooperation with the U.S. Customs Service on inspection of imports.

(b) *Virgin Islands.* Postal employees in the Virgin Islands may permit designated personnel of the U.S. Customs Service, without a search warrant, to examine the exterior (but not open or read the contents) of sealed mail which has originated in the CTUS and is addressed for delivery in the Customs district of the Virgin Islands. Upon the request of such Customs personnel, postal employees in the

Virgin Islands may ask the addressee of such sealed mail which such Customs personnel have reasonable cause to believe contains dutiable or prohibited matter to authorize such Customs personnel to open and inspect the contents of the sealed mail, or to appear at the post office to accept delivery of the sealed mail in the presence of a Customs official.

(c) *Privacy of correspondence.* No Customs personnel may read, allow any other person to read, divulge, or transfer to any other person any correspondence contained in sealed mail; nor may Customs personnel divulge, allow any other person to read or listen to, transfer to any other person, or knowingly listen to any paper or recording which is correspondence for the blind contained in unsealed mail; nor may Customs personnel divulge, allow any other person to read, or transfer to any person correspondence of school children permitted transmission in unsealed mail, unless such action is authorized by a search warrant issued under Rule 41 of the Federal Rules of Criminal Procedure.

(d) *Search warrant required for domestic and certain international mail.* No Customs personnel may, without a search warrant, open, inspect, read, or seize any mail in postal custody (including APO-FPO mail) which has not originated outside the CTUS, or which has diplomatic or consular immunity from customs inspection (USPS Publication 42, International Mail, sections 821.1a and 821.1b.)

.92 Department of Agriculture.

(a) *Foreign origin mail.* Without a search warrant, but with the written consent of the sender, designated personnel of the U.S. Department of Agriculture may open and inspect (but not read) the contents of mail (including APO-FPO mail) which has originated outside the Customs Territory of the United States ("CTUS") and is addressed for delivery inside the CTUS. Such inspection may be conducted only in accordance with part 330, USPS Publication 42, International Mail, relating to cooperation with the Department of Agriculture on plant quarantine inspections of imports.

(b) *Domestic mail from Hawaii or Puerto Rico.* Without a search warrant, designated USDA personnel may open and inspect (but not read) the contents of mail reasonably suspected of containing plant matter or plant pests, which has been mailed in Hawaii or Puerto Rico and is addressed to the United States mainland, either with the consent of the sender, or if the mail is unsealed. Such inspections may take place only in designated areas of the Hawaii or Puerto Rico post office, and only so long as the Federal plant quarantine of Hawaii or Puerto Rico remains in effect.

(c) *State terminal inspections.* Postal employees may cooperate with the Department of Agriculture and with State terminal inspection officials in accordance with the Terminal Inspection Act, 7 U.S.C. 166, or implementing regulations in USPS Publication 14, Plant Quarantines.

.93 Military Postal System.

This part applies to the military postal system and to all military personnel performing postal duties, including unit mail clerks. A search authorization issued by or under the authority of a commanding officer or a military judge is not a "search warrant" within the meaning of this part. Offenses committed against the security of mail in the custody of the military postal system, at home or aboard, are punishable under Federal criminal laws relating to postal offenses in Title 18, United States Code, as well as under the Uniform Code of Military Justice. Mail in the custody of the military postal system, if mailed outside the Customs Territory of the United States for delivery to an address within the Customs Territory of the United States, may be opened and searched (but correspondence in sealed mail may not be read) without a search warrant, by authorized personnel of the U.S. Customs Service in accordance with section 115.91, relating to customs inspection, and by authorized personnel of the Department of Agriculture in accordance with section 115.92(a), relating to plant quarantines of imports, even though for other purposes such mail is domestic mail, part 112.

.94 Customs inspection in Guam.

Postal employees in the Agana post office may permit designated customs officials of the Government of Guam, without a search warrant to open, inspect, and read the contents of unsealed mail, and to examine the exterior (but not open or read the contents) of sealed mail which is addressed for delivery within the Territory of Guam. Upon the request of Guam customs officials, postal employees in the Agana post office may ask the addressee of sealed mail which Guam customs reasonably suspects of containing dutiable or prohibited matter to authorize Guam customs to open and inspect the contents of the sealed mail, or to appear at the post office to accept delivery of the sealed mail in the presence of a Guam customs official.

.95 Canal Zone Postal Service.

.951 International transit mail.

The Canal Zone Postal Service shall comply with section 115.8 with regard to any international transit mail passed to it by a foreign postal administration.

.952 Mail Addressed to the United States or any area for which it is responsible.

The Canal Zone Postal Service shall comply with part 115 with regard to any mail passed to it by a foreign postal administration which is addressed for delivery in the United States or any area for which the United States is responsible (other than the Canal Zone).

.953 Mail passed to the Canal Zone Postal Service by the United States Postal Service not addressed for delivery in the Canal Zone.

The Canal Zone Postal Service shall comply with part 115 with regard to any mail passed to it by the United States Postal Service which is not addressed for delivery in the Canal Zone.

.954 Definitions.

For purposes of subsections 115.952 and 115.953, the words "postal employee" or words of like import in part 115 refer to an employee of the Canal Zone Postal Service; and the words "Postal Service" or "United States Postal Service" or words of like import refer to the Canal Zone Postal Service.

.96 Puerto Rico.

Under 48 U.S.C. 741a, postal employees in the San Juan Post Office are authorized to permit excise tax collection officials of the Commonwealth of Puerto Rico to record the names and addresses that appear on the exterior of incoming insured, certified, or C.O.D. mail, so long as no mail is opened or detained.

.97 Mail addressed to prisoners.

Authorized personnel of prisons, jails, or other correctional institutions, in accordance with lawful rules and regulations, may open, examine, and censor mail addressed to an inmate of the institution, if the inmate-addressee consents to receive his mail at the institution through the institutional authorities. If the inmate does not consent, the personnel may either deliver the inmate's mail to the inmate unopened, or return it to the post office unopened marked, "Refused."

An inmate may designate in writing an agent outside the institution to receive his mail, either through an authorized address of the agent if the mail is so addressed, or at the delivery post office serving the institution if the mail is addressed to the inmate at the institution.

PART 112—DOMESTIC MAIL SERVICE

2. Amend part 112 by inserting between the words "Army-Air Force (APO) and Navy (FPO) post offices" and the semicolon immediately following them, the words, "(except as provided in part 115)".

PART 137—OFFICIAL MAIL

3. Amend section 137.81 by inserting between the word "detained" and the word "even" in the first sentence, the words, ", except in accordance with part 115,".

A Post Office Services (Domestic) transmittal letter making these

changes in the pages of the Postal Service Manual will be published and will be transmitted to subscribers automatically. These changes will be published in the FEDERAL REGISTER as provided in 39 C.F.R. 111.3. (39 U.S.C. 401, 404, 3623(d)).

LOUIS A. COX,
General Counsel.

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14. The Postal Service will reject a claim where there has been collusion, or improper methods have been used to effect an arrest or to secure a conviction. It has the right to allow only one reward where several persons were convicted of the same offense, or one person was convicted of several offenses.

15. A written claim must be submitted to the Postal Inspector in Charge of the Division in which the crime was committed within 6 months from the date of conviction of an offender or the date of his death if killed in committing a crime or resisting arrest. Applications for the filing of claims may be obtained from the Inspector in Charge.

[39 U.S.C. 401, 404(8)) [38 FR 4673, Mar. 12, 1971, as amended at 37 FR 15305, July 29, 1972; 42 FR 4123, Jan. 24, 1977]

§ 233.2 Mail covers.

(a) *Policy.* The U.S. Postal Service maintains rigid controls and supervision with respect to the use of mail covers as investigative or law enforcement techniques.

(b) *Scope.* These regulations constitute the sole authority and procedure for initiating, processing, placing and using mail covers.

(c) *Definitions.* For purposes of these regulations, the following terms are hereby defined:

(1) "Mail cover" is the process by which a record is made of any data appearing on the outside cover of any class of mail matter, including checking the contents of any second-, third-, or fourth-class mail matter as now sanctioned by law, in order to obtain information in the interest of (i) protecting the national security, (ii) locating a fugitive, or (iii) obtaining evidence of commission or attempted commission of a crime.

(2) "Fugitive" is any person who has fled from the United States or any State, territory, the District of Columbia, or possession of the United States, to avoid prosecution for a crime, to avoid punishment for a crime or to avoid giving testimony in a criminal proceeding.

(3) "Crime", for purposes of these regulations, is any commission of an act or the attempted commission of an act that is punishable by law by imprisonment for a term exceeding 1 year.

(4) "Law enforcement agency" is any authority of the Federal Government or any authority of a State or local government one of whose functions is to investigate the commission or attempted commission of acts constituting a crime.

(d) *Authorizations—Chief Postal Inspector.* (1) The Chief Postal Inspector is the principal officer of the Postal Service in the administration of all matters governing mail covers. He may delegate any or all authority in this regard to not more than two designees at Inspection Service Headquarters. Except for national security mail covers, he may also delegate any or all authority to the Regional Chief Postal Inspectors. All such delegations of authority shall be issued through official directives.

(2) The Chief Postal Inspector, or his designee, may order mail covers under the following circumstances:

(i) When he has reason to believe the subject or subjects of the mail cover are engaged in any activity violative of any postal statute.

(ii) When written request is received from any law enforcement agency wherein the requesting authority stipulates and specifies the reasonable grounds that exist which demonstrate the mail cover is necessary to (A) protect the national security, (B) locate a fugitive, or (C) obtain information regarding the commission or attempted commission of a crime.

(iii) Where time is of the essence, the Chief Postal Inspector, or his designee, may act upon an oral request to be confirmed by the requesting authority in writing within 2 business days. However, no information shall be released until an appropriate written request is received.

(e) *Postal Inspectors in Charge.* (1) All Postal Inspectors in Charge, and not more than three designees pursuant to delegations in writing, may order mail covers within their districts under the following circumstances:

(i) Where he has reason to believe the subject or subjects are engaged in an activity violative of any postal statute.

(ii) Where written request is received from any law enforcement agency of the Federal, State, or local governments, wherein the requesting authority stipulates and specifies the reasonable grounds that exist which demonstrate the mail cover would aid in the location of a fugitive, or that it would assist in obtaining information concerning the commission or attempted commission of a crime.

(2) Except where mail covers are ordered by the Chief Postal Inspector, or his designee, requests for mail covers must be approved by the Postal Inspector in Charge, or his designee, in each district in which the mail cover is to operate.

(3) Where time is of the essence, the Postal Inspector in Charge, or his desig-

nee, may act upon an oral request to be confirmed by the requesting authority in writing within 2 business days. However, no information shall be released until an appropriate written order is received.

(f) *Limitations.* (1) No person in the Postal Service, except those employed for that purpose in dead-mail offices, may break or permit breaking of the seal of any matter mailed as first-class mail without a search warrant, even though it may contain criminal or otherwise unmailable matter, or furnish evidence of the commission of a crime.

(2) No mail covers shall include matter mailed between the mail cover subject and his known attorney-at-law.

(3) No officer or employee of the Postal Service other than the Chief Postal Inspector, or Postal Inspectors in Charge, and their designees, are authorized to order mail covers. Under no circumstances shall a postmaster or postal employee furnish information as defined in § 233.2(c) to any person except as authorized by the Chief Postal Inspector, a Postal Inspector in Charge, or their designees.

(4) Excepting mail covers ordered upon subjects engaged, or suspected to be engaged, in any activity against the national security, or activity violative of any postal law, no mail cover order shall remain in force and effect for more than 30 days. At the expiration of such period, or prior thereto, the requesting authority may be granted additional 30-day periods under the same conditions and procedures applicable to the original request.

(5) No mail cover shall remain in force longer than 120 days unless personally approved for further extension by the Chief Postal Inspector.

(6) Excepting fugitive cases, no mail cover shall remain in force when the subject has been indicted for any cause. If the subject is under investigation for further criminal violations, a new mail cover order must be requested consistent with these regulations.

(g) *Records.* (1) All requests for mail covers, with records of action ordered thereon, and all reports issued pursuant thereto, shall be deemed within the custody of the Chief Postal Inspector. However, the physical housing of this data shall be at the discretion of the Chief Postal Inspector.

(2) The Postal Inspectors in Charge shall promptly submit copies of all requests for mail covers and the determination made thereon to the Chief Postal Inspector, or to his designee for review.

(3) If the Chief Postal Inspector, or his designee, determines a mail cover was improperly ordered by a Postal Inspector in Charge or his designee all data acquired while the cover was in force shall be destroyed, and the requesting authority notified of the discontinuance of the mail cover and the reasons therefor.

(4) Any data concerning mail covers shall be made available to any mail cover subject in any legal proceeding through appropriate discovery procedures.

(5) The retention period for files and records pertaining to mail covers shall be 8 years.

(h) *Reporting to Requesting Authority.* Once a mail cover has been duly ordered, authorization may be delegated to any officer in the Postal Service to transmit mail cover reports directly to the requesting authority. Where at all possible, the transmitting officer should be a Postal Inspector.

(i) *Review.* (1) The Chief Postal Inspector, or his designee, shall review all actions taken by Postal Inspectors in Charge or their designees upon initial submission of a report on a request for mail cover.

(2) The Chief Postal Inspector's determination in all matters concerning mail covers shall be final and conclusive and not subject to further administrative review.

[40 FR 11570, Mar. 12, 1975]

§ 233.3 Withdrawal of mail privileges.

(a) *False representation and lottery mail orders.* (1) When a person or concern is using the mails to conduct a lottery or scheme seeking remittances in the mail based on false representations, the Postal Service, upon satisfactory evidence received by it, may order such mail returned to senders marked as the case may be, "Lottery Mail" or "Return to Sender: Order Issued Against Addressee for Violation of False Representation Law." The judicial officer acts on behalf of the Postal Service in these matters.

(2) Notice of these orders is published in the Postal Bulletin.

(3) Notices of orders against foreign enterprises are cumulated in Publication 43 (distributed to exchange offices).

(4) Each order against a domestic enterprise is enforced only by the post office designated in the order. Each order against a foreign enterprise is enforced by all exchange offices.

UNITED STATES GOVERNMENT

memorandum

DATE: Dec. 28, 1976

REPLY TO ATTN OF: The Attorney General

SUBJECT: Domestic Operations Guidelines

TO: Peter Bensinger, Administrator
Drug Enforcement Administration

I am attaching the Domestic Operations Guidelines for the Drug Enforcement Administration which I am issuing effective this date. I understand that the implementation of these guidelines will necessarily require some changes in procedures currently in effect in the Drug Enforcement Administration. Please take whatever steps are necessary to implement these guidelines and let me know when they have been made fully operational.

cc. Deputy Attorney General

December 28, 1976

DRUG ENFORCEMENT ADMINISTRATION
DOMESTIC OPERATIONS GUIDELINES

The following guidelines are intended to promote efficiency in the operations of the Drug Enforcement Administration (DEA) and to improve coordination between DEA and other branches of the Department of Justice. The imposition of any sanction for failure to comply with these guidelines remains exclusively within the jurisdiction of the Attorney General and the Administrator of DEA, and such other persons as they may designate.

I. ENFORCEMENT ACTIVITIES

A. Objective

1. Enforcement activities are those procedures employed by DEA Special Agents intended to result in (1) the arrest, prosecution and incarceration of drug traffickers, (2) the disruption of illicit traffic, (3) the reduction of drug availability through seizure of drugs and equipment necessary for operation of drug networks, and (4) deterrent effects on other traffickers by discouraging continued or potential trafficking.

2. Enforcement activities shall be undertaken with the primary objectives of prosecuting individuals, or individuals acting in concert, who finance, control, or direct drug trafficking organizations, or of interdicting the flow of drugs from significant drug trafficking operations.

3. Enforcement activities of DEA include what are traditionally considered investigation activities and intelligence activities. For the purposes of these guidelines, investigation is defined as the process of gathering evidence primarily for the immediate purpose of initiating a criminal prosecution, or for the seizure of specific unlawful shipments of controlled substances. The term "investigation" as used in these guidelines is not intended to include investigations of "leads" originated by or furnished to

DEA offices. For the purposes of these guidelines, intelligence is defined as information gathered in support of the mission of DEA which is not collected primarily for the immediate purpose of initiating a specific prosecution, but which may ultimately lead to prosecution of one or more individuals or the seizure of unlawful shipments of controlled substances.

4. DEA investigations often produce ancillary intelligence, and DEA intelligence activities often produce evidence useful in criminal prosecutions. Internal review mechanisms provided for by these guidelines are not intended to apply to sporadic intelligence activities; nor are such activities to be reported to the United States Attorneys as investigations under Section ID of these guidelines. On the other hand, the systematic gathering of information targeted on an individual or individuals, or on a drug trafficking operation, which continues for a period of 45 days should be considered as an investigation within the meaning of Section IB, C and D relating to consultation with United States Attorneys.

B. Initiating Enforcement Activities

1. Investigation may be initiated based on facts or information indicating possible violation of the Controlled Substances Act, or other laws within the investigative jurisdiction of the Drug Enforcement Administration.

2. In each investigation an initiation report will be prepared by the Special Agent setting out the basis for the investigation. Supervisory approval of anticipated enforcement activity, including undercover operations, is required prior to any Special Agent or informant undertaking action.

C. Review and Continuation of Enforcement Activities

1. All review and approval for continuation of enforcement activities as provided below shall be reflected in writing.

2. An Agent's immediate supervisor shall review each investigation within thirty (30) days after it is initiated to determine if further investigation is warranted.

   (a) Investigations may continue beyond thirty (30) days where there is a clear indication of a violation of law within DEA's investigative jurisdiction. Investigations shall continue in accordance with other provisions of these guidelines.

   (b) In the absence of a clear indication of a violation of law, the agent's immediate supervisor shall authorize continued investigation beyond thirty (30) days only if there is reason to believe the investigation may lead to:

      (i) prosecution of one or more individuals who finance, control, or direct a drug trafficking organization; or

      (ii) interdiction of the flow of drugs from a significant drug trafficking operation (e.g., seizing a major shipment or processing laboratory).

3. An agent's immediate supervisor shall review all investigations continuing ninety (90) days after initiation to determine if further investigation is warranted. Investigation may continue beyond ninety (90) days only if there is:

   (a) clear indication that investigation is likely to result in prosecution of one or more individuals who finance, control, or direct a drug trafficking organization, or disruption of significant drug trafficking.

   (b) where there is no clear indication of significant prosecution or disruption of drug trafficking, investigation shall continue only with the written approval of the appropriate Assistant Regional Director.

4. If enforcement activity is discontinued pursuant to paragraph I C (2) or (3) above, enforcement activity may be reinstituted at any time new information consistent with the standards of paragraph I C (2) or (3) is received or developed.

5. Regional Directors shall ensure that each DEA investigation is reviewed at an appropriate supervisory level six months after its initiation, and at six-month intervals for as long as investigation continues, and may authorize its continuation if the standard set forth in paragraph I C 3 (a) or (b) is met.

6. Upon completion of a six-month review Regional Directors shall report to DEA headquarters each investigation authorized to continue under I C 3 (b) above, and shall set forth their reasons for continuing investigation.

7. Regional Directors will be responsible for reporting to DEA headquarters on all important intra and interregional investigations which indicate potential multiple prosecutions of important violators. DEA may impose additional review and reporting requirements consistent with these guidelines.

D. Coordination with United States Attorneys

The purpose of this section of the guidelines is to insure that United States Attorneys are advised of all major investigations for which they will have responsibility for prosecution.

1. The Drug Enforcement Administration shall insure that the appropriate United States Attorney is advised of all investigations as soon as it appears to the first-line supervisory DEA agent that there is probable cause to make an arrest, even though no arrest is in fact contemplated. Additionally, in investigations where the subjects are believed to be part of a major drug trafficking organization, but probable cause to make an arrest has not yet been established, the notification of a pending investigation to the United States Attorney shall be made by DEA at such time as it is determined that the subjects are part of a major drug trafficking organization. In no event shall notification of any "investigation," as defined in paragraphs IA3 and 4, be made to the United States Attorney later than 45 days after its initiation. The United States Attorney shall be consulted, shall assign an Assistant United States Attorney if appropriate, and shall be furnished progress reports of the investigation at regular intervals to assure appropriate participation by prosecuting officials.

45 day RULE

2. Investigations required to be reported to a United States Attorney under paragraph I D 1 which involve possible offenses prosecutable in more than one federal judicial district shall be reported to the Department of Justice, and to the appropriate United States Attorneys. The Department shall be consulted and furnished progress reports on such investigations at regular intervals.

3. The United States Attorney in each federal judicial district shall, consistent with Department of Justice guidance, determine policy regarding declinations and also the referral of prosecutions to state and local authorities.

4. The United States Attorney shall, except in exigent circumstances, be consulted prior to the arrest of a defendant and again immediately after the arrest. The United States Attorney shall be furnished a written report of the arrest no later than five (5) working days after the arrest. The provisions of this subparagraph shall not apply to arrests of defendants who will be prosecuted in state or local courts, provided that such referrals for state or local prosecution are within the policy determinations and procedures of the United States Attorney provided for in subparagraph "3", above.

5. In all cases of seizures without a search warrant, unless reported incident to an arrest, a report in writing shall be submitted to the United States Attorney not later than ten (10) working days after the seizure.

6. DEA shall, with due regard for the time necessary to prepare for trial, advise the prosecuting United States Attorney of any compensation paid to, or other consideration furnished to, an informant or defendant-informant, as well as of any electronic surveillance relating to the case.

7. All relevant DEA case files and manuals will be available for review by U.S. Attorneys on request. The U.S. Attorney shall be responsible for insuring the security and confidentiality of materials furnished by DEA.

8. Department of Justice instructions to United States Attorneys relating to these guidelines will be provided to DEA.

II. SOURCES, INFORMANTS AND DEFENDANT-INFORMANTS

A. General

1. A "source of information" is a person or organization furnishing information without compensation on an occasional basis (e.g., an observer of an event, or a company employee who obtains relevant information in the normal course of his employment), or a person or organization in the business of furnishing information for a fee and receiving only its regular compensation for doing so (e.g., a credit bureau).

2. An "informant" is a person who, under the specific direction of a DEA Agent, with or without the expectation of payment or other valuable consideration, furnishes information regarding drug trafficking or performs other lawful services.

3. A "defendant-informant" is a person subject to arrest and prosecution for a federal offense, or a defendant in a pending federal or State case who, under the specific direction of a DEA Agent, with an expectation of payment or other valuable consideration, provides information regarding drug trafficking or performs other lawful services.

4. Any individual or organization may be a source of information. Restrictions placed on the use of informants and defendant-informants are not applicable to sources of information.

5. Informants, and defendant-informants are assets of DEA, and are not to be considered personal resources of individual Agents. At least two (2) DEA Agents should be in a position to contact an informant or defendant-informant, and wherever practicable two (2) shall be present at all contacts and interviews with informants and defendant-informants. Regular contacts shall be maintained with informants and defendant-informants.

6. Informants, and defendant-informants shall be advised that they are cooperating with DEA, but are not agents or employees of DEA or the federal government. They shall be advised that information they provide may be used in a criminal proceeding. They may be told that DEA will use all lawful means available to maintain the confidentiality of their identity. Except in extraordinary circumstances they should not be assured that they will never be required to testify or otherwise have their identity disclosed in a criminal proceeding. In extraordinary circumstances they may be given this assurance after approval of the Regional Director, provided the United States Attorney shall be notified of any such assurance given to any individual having information relevant to a pending investigation in advance of prosecution proceedings, including grand jury proceedings.

B. Informants

1. Only individuals who are believed able to furnish reliable enforcement information or other lawful services, and who are believed able to maintain the confidentiality of DEA interests and activities, may be utilized as informants.

2. Except as provided in paragraph II B (3), an Agent must obtain the approval of his immediate supervisor prior to utilizing any informant. The approving supervisor should review the relevant data, including the criminal record, of any potential informant and ascertain whether he is the subject of a pending DEA investigation before deciding whether to approve him as an informant. Before an individual is asked to render services, in addition to supplying information, a more extensive investigation and evaluation of the individual shall be conducted. However, DEA may use an informant temporarily without extensive investigation where a second-line supervisor determines that lack of sufficient time precludes such investigation.

3. Individuals in the following categories represent particular risks as informants, and their use for an initial ninety (90) days may be utilized only as authorized below:

(a) individuals who are less than eighteen (18) years of age, with the written consent of a parent or a legal guardian, when authorized by the Regional Director;

(b) individuals on Federal or state probation or parole, with the consent of the agency supervising them, and complete documentation by DEA, when authorized by the Regional Director;

(c) former drug-dependent persons, or drug-dependent persons participating in an established drug treatment program, when authorized by the Regional Director.

(d) individuals with two (2) or more felony convictions, when authorized by the Regional Director; and

(e) individuals who have previously been declared unreliable by DEA, or any of its predecessors, when authorized by the Assistant Administrator for Enforcement.

4. The use of an informant shall be reviewed at least every ninety (90) days by the appropriate second-line supervisor, or the higher official indicated in paragraph II B (3) above. Use of the informant may be continued if it is determined, upon review of his background and performance, that he is qualified to serve in this capacity as provided in paragraph II B (1) above, and that he has the potential for furnishing information or services which it is believed will lead to the prosecution of one or more individuals who finance, control, or direct a drug trafficking organization or the interdiction of significant drug traffic. The Regional Director shall be responsible for review of the utilization of each informant at least every six months, and continued use of an informant shall be authorized if it is determined that he meets these standards. The Regional Director shall be responsible for reporting all such decisions to DEA headquarters.

5. Informants may be paid money or afforded other lawful consideration. All funds paid to informants shall be accounted for, and specific records shall be maintained of any non-monetary consideration furnished informants.

C. Defendant-Informants

1. Only individuals who are believed to be able to furnish reliable enforcement information or lawful services, and who are believed able to maintain the confidentiality of DEA interests and activities, may be used as defendant-informants.

2. In addition to the steps necessary to utilize an informant which are set forth in paragraph II B, the approval of the appropriate United States Attorney shall be obtained prior to seeking the cooperation of, or utilizing a defendant-informant.

3. An individual approved as a defendant-informant may be advised that his cooperation will be brought to the attention of the appropriate United States Attorney, or other prosecutor. DEA Agents shall make no other representations or recommendations without the express written approval of the Regional Director.

4. The Regional Director shall obtain the written approval of the Assistant Administrator for Enforcement prior to recommending dismissal of any criminal matter. The Regional Director shall inform DEA headquarters of any other information concerning a defendant-informant's cooperation, or advice offered regarding disposition of a case, or imposition of a penalty.

5. Use of defendant-informants shall be reviewed in the manner prescribed for other informants in paragraph II B above, and their use may be continued only if they are found to meet the standards set forth therein.

D. Knowledge of Criminal Activity by Informants and Defendant-Informants

1. DEA shall instruct all informants and defendant-informants that they shall not violate criminal law in furtherance of gathering information or providing other services for DEA, and that any evidence of such violation will be reported to the concerned law enforcement authority.

2. Whenever DEA has reason to believe that a serious criminal offense outside its investigative jurisdiction is being or will be committed, it shall immediately disseminate all relevant information to the appropriate law enforcement agency.

3. Whenever DEA has reason to believe that an informant or defendant-informant has committed a serious criminal offense the appropriate law enforcement agency shall be advised by DEA, and the appropriate United States Attorney shall be notified.

4. In disseminating information in accordance with paragraphs D 2 and 3 above, all available information shall be promptly furnished to the appropriate law enforcement agency unless such action would jeopardize an ongoing major investigation or endanger the life of a DEA Agent, informant or defendant-informant. If full disclosure is not made for the reasons indicated, then limited disclosure shall be made by DEA to the appropriate authorities, to an extent sufficient to apprise them of the specific crime or crimes that are believed to have been committed. Full disclosure shall be made as soon as the need for the restrictions on dissemination are no longer present. Where complete dissemination cannot immediately be made to the appropriate law enforcement agency, DEA shall preserve all evidence of the violation for possible future use by the appropriate prosecuting authority. Nothing herein shall prevent full and immediate disclosure to the appropriate law enforcement agency if in DEA's judgment such action is necessary even though an investigation might thereby be jeopardized.

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5. If DEA desires to continue making use of an informant or defendant-informant after it has reason to believe that he has committed a serious criminal offense, DEA shall advise the appropriate United States Attorney and a determination shall be made by him after consultation with the Chief of the Narcotics and Dangerous Drug Section, of the Criminal Division of the Department of Justice, whether continued use should be made of the individual by DEA.

III. UNDERCOVER OPERATIONS

A. Undercover operations involve DEA Agents who assume a fictitious identity or role on a temporary basis (often posing as individuals involved in drug trafficking), and/or the use of informants or defendant-informants under the direction of DEA, to obtain evidence or other information relating to violations of the Controlled Substances Act or other drug laws.

B. Undercover operations conducted by DEA may include employment of a ruse or deception, the provision of a facility or an opportunity for commission of an offense, or the failure to foreclose such an opportunity, or mere solicitation that would not induce an ordinary, law-abiding person to commit an offense.

C. Undercover operations may be authorized where there is reason to believe use of this technique may result in evidence or information concerning significant drug trafficking activities. Undercover operations must be authorized by a group supervisor, SAIC, or ARD. Such authorization must be written, however, in exigent circumstances documentation may be prepared after the undercover operation has been initiated provided oral authorization has first been obtained. Authorizations for undercover operations shall set forth a description of the undercover operation and the provisions made for the protection of undercover Agents or informants.

D. DEA may furnish an item necessary to the commission of an offense other than a controlled substance, (i.e., a legal chemical essential to drug production), or may furnish services in furtherance of illegal drug trafficking which are difficult to obtain (i.e., sophisticated chemical expertise), upon the authorization of the Regional Director, after consultation with the appropriate United States Attorney and with DEA Headquarters. Activity such as furnishing a non-controlled substance, or other services, may be authorized when there is strong reason to believe such activity will lead to the prosecution of one or more individuals who finance, control, or direct a drug trafficking organization, or to the interdiction of the flow of drugs from a significant drug trafficking operation.

E. Undercover operations shall not include the furnishing of a controlled substance except in extraordinary cases after consultation with the appropriate United States Attorney, when the Administrator of DEA determines that there is reason to believe such activity will lead to the prosecution of one or more individuals who finance, control, or direct a drug trafficking organization, or to the interdiction of the flow of drugs from a significant drug trafficking operation. In making such determinations the Administrator of DEA shall take into account the type and amount of drug involved; its likelihood of reaching consumers; the number and position in the drug trafficking organization of subjects who have, and who have not, been sufficiently identified to be arrested; the type and amount of evidence necessary to complete the investigation; the time required to attempt to do so; and the likelihood of obtaining such evidence.

F. Regional Directors shall advise DEA Headquarters immediately if specific information is developed, in the course of an undercover operation or otherwise, regarding the shipment, delivery, or location of substantial amounts of controlled substances. In certain cases it may be appropriate not to seize such drugs in order to enhance the effectiveness of an investigation. DEA may continue an investigation without seizing substantial amounts of illicit drugs only when:

1. Authorized by the Assistant Administrator for Enforcement of DEA or his headquarters designee. The Assistant Administrator for Enforcement shall consider the factors set forth in paragraph IIIE above, and may authorize the investigation to continue without seizure of the drugs in question if he makes the determination set forth therein. His decision shall be reflected in writing.

2. Where immediate seizure of substantial amounts of controlled substances might result in compromise of an investigation of greater significance than seizure would warrant, or in the death or serious injury to a DEA Agent, informant, or defendant-informant, an immediate decision may be made by the field Agent or his supervisor, consistent with the safety of the Agent, informant or defendant-informant. In such instances the Assistant Administrator for Enforcement shall be promptly notified.

G. While it is recognized that there is an inherent risk of violence in drug trafficking, undercover operations shall not include originating, encouraging, or planning to participate in violent activity. If in the course of an undercover operation there is a prospect of previously unanticipated violence, the agent, informant, or defendant-informant involved shall make every effort consistent with his personal safety to prevent such violent activity and, to the extent he is not completely successful, to minimize the degree of violence and to avoid participation in it.

H. In conducting undercover operations DEA Special Agents, informants, and defendant-informants shall not attend meetings between defendants and their counsel if attendance can be avoided. If attendance cannot be avoided they shall not report anything they may overhear while present at meetings with counsel, unless they observe the commission of a crime.

I. Informants and defendant-informants used in undercover operations, shall be advised of the standards established by these guidelines relevant to the activities they are asked to undertake on behalf of DEA.

IV. ELECTRONIC SURVEILLANCE AND RELATED TECHNIQUES

Electronic surveillance and related techniques may be employed as follows:

A. Interception of wire or oral communications through the use of any electronic, mechanical or other device ("wiretaps" or "bugs") in accordance with Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, and the related Department of Justice instructions.

B. Recording telephone numbers dialed and related information by the use of "pen registers" and "touch tone decoders" pursuant to a Federal court order in the nature of a warrant issued under Rule 41 of the Federal Rules of Criminal Procedure.

C. Electronic tracking devices ("beepers") and transponders when authorized by a Group Supervisor or higher authority, and pursuant to a Federal Court order in the nature of a warrant of the type issued under Rule 41 of the Rules of Criminal Procedure if installation involves a trespass or if otherwise required by the Federal case law in the judicial district or districts involved.

D. Telephones and transmitters to monitor private conversations with the consent of a party to the conversation pursuant to the provisions of the Attorney General's "Memorandum to the Heads of Executive Departments and Agencies," dated October 16, 1972.

E. Photographic, optical (e.g., binoculars), electro-optical (e.g. night vision equipment), and television equipment as surveillance aids or for recording evidence, pursuant to the provisions of the DEA Agents Manual.

F. Electronic, magnetic, vibration sensors, and radar equipment to detect the movement of persons, vehicles, vessels, and aircraft pursuant to the provisions of the DEA Agents Manual.

G. No other form of electronic surveillance or related technique may be utilized.

OFFICE OF THE DIRECTOR

UNITED STATES DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF INVESTIGATION

WASHINGTON, D.C. 20535

JAMES B. ADAMS

James B. Adams was born on December 21, 1926, in Corsicana, Texas, and received his elementary and high school education in Mexia, Texas. He enlisted in the Army in April, 1944, and attended the Army Specialized Training Program at Louisiana State University, the University of Minnesota and Yale University. He received intensive training in the Japanese language and thereafter served as a Japanese interpreter overseas. He was discharged from military service in October, 1946.

Mr. Adams enrolled at Baylor University, Waco, Texas, in 1947, where he received a Bachelor of Arts degree. In 1949 Mr. Adams received his Bachelor of Laws degree from Baylor Law School. He served as a State Representative in Texas until his appointment as a Special Agent in July, 1951. He subsequently served in the Seattle, Washington, and San Francisco, California, FBI Offices until 1953 when he was ordered to FBI Headquarters, Washington, D. C., to assume supervisory duties in the Administrative Division. In 1958 he assumed supervisory responsibilities in the Training and Inspection Division and in September, 1959, was designated Assistant Special Agent in Charge of the FBI's Minneapolis, Minnesota, Office. He was reassigned to the Administrative Division at FBI Headquarters in March, 1961.

In December, 1965, Mr. Adams was appointed Personnel Officer of the FBI and in March, 1971, was elevated to the rank of Inspector. In May, 1971, he was assigned to the Office of the Assistant to the Director and in July, 1972, was designated Special Agent in Charge of the FBI's Office in San Antonio, Texas. In January, 1974, he was ordered to return to FBI Headquarters and was promoted to the position of Assistant Director of the Office of Planning and Evaluation.

In June, 1974, Mr. Adams was appointed Assistant to the Director-Deputy Associate Director in charge of investigative operations. In this position, he directed the

Intelligence and Criminal Investigative Divisions. His responsibilities required oversight of investigations in such areas as organized crime, white-collar crime, personal and property crime, civil rights, employee security, domestic security and terrorism, and foreign espionage activities.

In April, 1978, he was named Associate Director of the FBI. In this position, he is the second-highest ranking FBI Official.

United States Department of Justice
ASSISTANT ATTORNEY GENERAL
LEGISLATIVE AFFAIRS

SEP 7 1978

Honorable Edward M. Kennedy
United States Senate
Washington, D.C. 20505

Dear Senator Kennedy:

During hearings that you chaired on April 25, 1978, on the proposed FBI Charter, a question was asked by Senator Metzenbaum regarding the percentage of adult Americans represented in the FBI's fingerprint files.

The FBI conducted studies during May to August 1978. Results of those studies are set forth in the enclosed memorandum.

Sincerely,

(Signed) Patricia M. Wald

Patricia M. Wald
Assistant Attorney General

Attachment

cc: Senator Metzenbaum
Senator Abourezk

OFFICE OF THE DIRECTOR

UNITED STATES DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF INVESTIGATION

WASHINGTON, D.C. 20535

August 28, 1978

HEARINGS BEFORE THE SENATE COMMITTEE ON THE JUDICIARY HELD APRIL 25, 1978, ON THE FBI CHARTER

During the hearings before the Senate Committee on the Judiciary held April 25, 1978, regarding the development of a statutory Charter for the FBI, Senator Howard M. Metzenbaum asked the FBI's witness, Mr. John J. McDermott, Deputy Associate Director (Administration), to advise the Committee "as to the percentage of adult Americans that you feel you presently have and for which you believe you presently have fingerprints." Mr. McDermott responded that he would have the matter studied. Accordingly, studies utilizing statistical sampling techniques were conducted during May to August 1978 in order to determine the answer to Senator Metzenbaum's inquiry. The basic assumptions, limitations, and results of the studies are set forth below:

The FBI Identification Division's fingerprint holdings consist of two files, i.e., the Criminal Fingerprint File and the Civil Fingerprint File. The Criminal Fingerprint File contains the fingerprint cards of approximately 22,000,000 persons arrested for serious and nonserious offenses. The Civil Fingerprint File contains the nonarrest fingerprint cards (i.e., fingerprints submitted in connection with service in the Armed Forces, employment in the Federal Government, alien matters, personal identification, etc.) of approximately 42,000,000 persons. Because the two files are maintained and operated as two physically separate files, the studies by necessity had to deal with them separately.

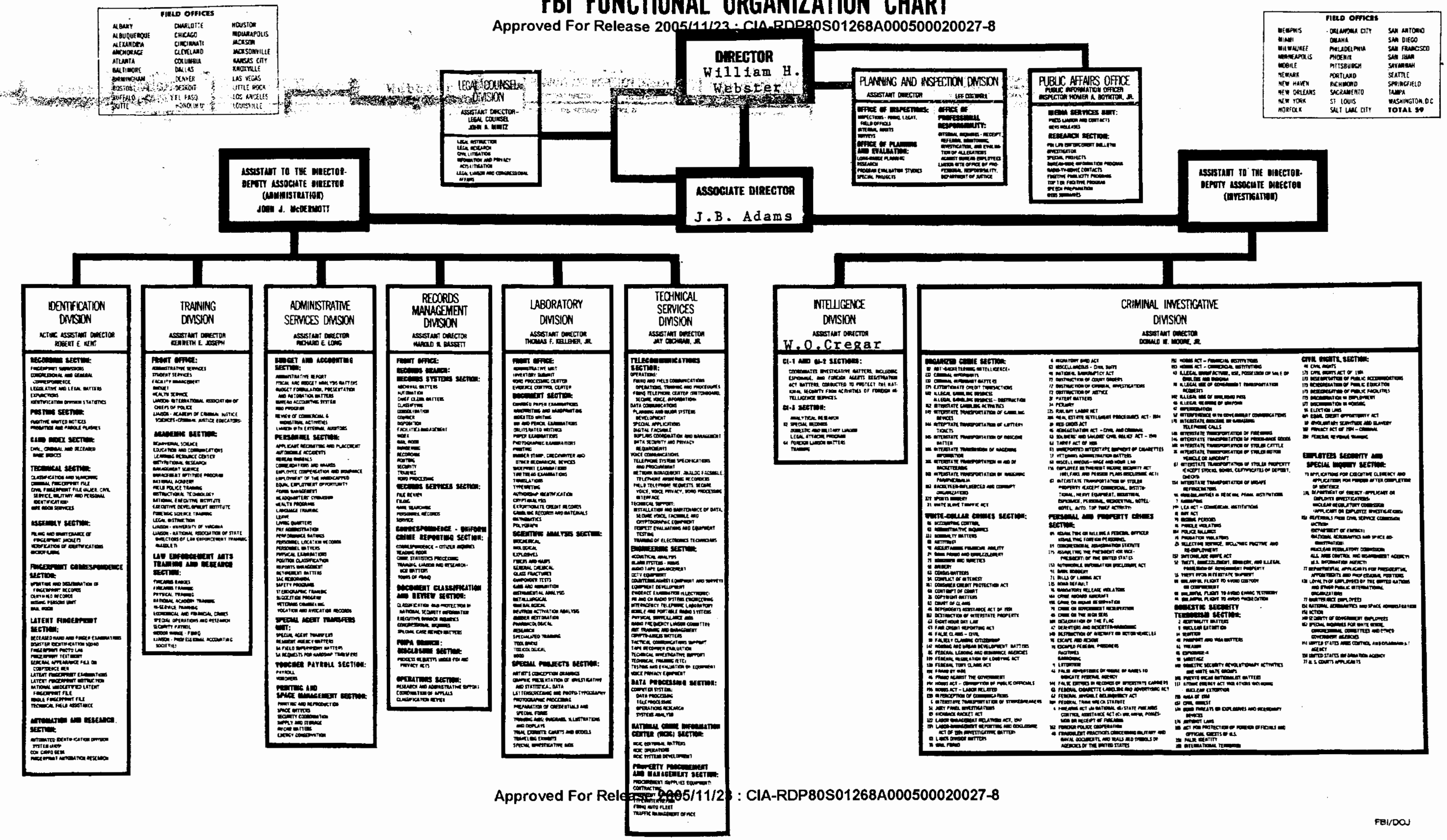
Senator Metzenbaum couched his inquiry in terms of "adult Americans." Since persons 18 years old and over are treated as "adults" in the files, the same criterion was utilized for the purposes of the studies. As there is no way of determining the citizenship of all of the persons represented in the FBI's fingerprint files, nor are there authoritative data as to the number of "citizens" versus "residents" of the country, the results of the studies are expressed in terms of the "U. S. population" rather than "Americans." However, in an effort to make the results comport as closely

to Senator Metzenbaum's request as possible, the records of illegal aliens (those arrested for violation of immigration laws) were not included in the studies.

The U. S. population figure which was utilized is a provisional estimate as of June 1, 1978, furnished by the Bureau of the Census, U. S. Department of Commerce. Life tables, available from the National Center for Health Statistics, Public Health Service, U. S. Department of Health, Education, and Welfare, were adjusted to reflect the sex and race distributions of the files and used to estimate the number of records relating to deceased persons, which number was subtracted from the total number of records on file.

Based upon the results of the studies, it is estimated that 10.6 percent of the U. S. population 18 years old and over is represented in the FBI's Criminal Fingerprint File. On the other hand, it is estimated that 22.0 percent of the U. S. population 18 years old and over is represented in the FBI's Civil Fingerprint File. There is some duplication between the two files, i.e., certain persons have records in both the Criminal and the Civil Fingerprint Files. The studies indicate such duplication to be approximately 3.1 percent. Therefore, the total estimated percentage of the U. S. population 18 years old and over represented in all of the FBI's fingerprint files is 29.5 percent.

FBI FUNCTIONAL ORGANIZATION CHART



FBI/DOJ